Public Utilities FORTNIGHTLY

May 2, 1929

PUBLIC UTILITIES REPORTS, INC.
WASHINGTON, D. C.

1400-lb. pressure at Milwaukee

At Lakeside Station, the Milwaukee Electric Railway & Light Company is installing a Combustion Steam Generating unit capable of delivering 250,000 pounds of steam per hour and designed for a maximum pressure of 1400-lb. gage.

This unit is equipped with C-E Fin Tube water-cooled furnace walls, C-E plate type Air Preheater and is fired by a Lopulco pulverized fuel system of the storage type.

The Milwaukee Electric Railway & Light Company was the first public utility company to adopt pulverized fuel firing. The use of high steam pressure at Lakeside again evidences the progressive spirit of that organization.

This high pressure unit is an excellent example of coordinated design. The complete fuel burning and steam generating equipment was sold under one contract—one responsibility and one set of guarantees.

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COMBUSTION ENGINEERING

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Public Utilities Fortnightly

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PUBLIC UTILITIES REPORTS, INC., PUBLISHERS

PUBLIC UTILITIES FORTNIGHTLY; a magazine dealing with the problems of utility regulation and allied topics, including the official decisions of the State Commissions and courts; endorsed by the National Associations of the Utility Industry and by the National Association of Railroad and Utilities Commissioners, and supported in part by those conducting public utility service, manufacturers, bankers, accountants and other users of the publication. Published every other Thursday; 75 cents a copy; $15.00 a year; with bound volumes and Annual Digest, $32.50 a year. Editorial and advertising office, Munsey Building, Washington, D. C., circulation office, Duffy-Powers Building, Rochester, N. Y. Entered as second-class matter April 29, 1915, at the Post Office at Rochester, N. Y., under the Act of March 3, 1879.

Pages with the Editor

In order to visualize at a glance the editorial content of that mythical object, the "Average Issue" of Public Utilities Fortnightly, the Editor has prepared the graphic shart shown on page VIII.

* *

This graph indicates the approximate space given by this magazine to the various classes of public utilities, during the period of a year.

* *

One-third of the magazine is devoted to the broader problems—economic, legal, financial, political—that affect all public utilities as a group.

* *

In addition, certain contributions are of special if not exclusive value to specific utilities.

* *

In the preparation of this graphic chart—(which after all is but a very sketchy approximation of the Average Issue)—the Editor bore in mind the small boy who was laboriously engaged on an elaborate pencil drawing, when he was discovered by his father.

* *

"What are you drawing?" his sire inquired.

* *

"I'm drawing a picture of God and the angels," was the unexpected reply.

* *

For a moment the questioner was taken back. Finally he ventured: "But nobody knows what God looks like."

* *

The artist continued his labors without pausing or looking up. "They will when I've finished this," he assured the doubter.

* *

Among the interesting decisions recorded in this issue of the magazine are the following:

* *

The decision of the United States Supreme Court in the New York City 7-cent fare case appears on page 434. Of particular interest is the ruling on the necessity of exhausting remedies in the state before appealing to the Federal Courts.

* *

On the question of confiscation because of an inadequate return the Supreme Court announces its attitude towards a claim by a railway company for a return on elevated lines leased from a private company and subways owned by a city but operated by the private corporation.

* *

The much-discussed licensee contract between the American Telephone & Telegraph Company and its subsidiaries has been scrutinized by the Michigan supreme court. (See page 455.) The court's opinion sheds more light on the question of disregarding the corporate entity and considering a holding company and its subsidiaries to be a single organization.

* *

The heating quality of gas is considered by the Massachusetts and the Missouri Commissions. (See pages 433 and 465.) The reflection of a lower heating value in the rates to consumers is also involved.

* *

The Baltimore fare case, which has been before the courts and the Commission for some time, is again the subject of a decision by the Maryland court of appeals. (See page 467.) The court has upheld a return of 6.26 per cent on the value of the property, which the company alleges to be discriminatory.

* *

The necessity of Commission approval of an extension of service by a municipal electric plant beyond the city limits is treated by the New York supreme court on an application by an electric company for an injunction to restrain the construction of such an extension. (See page 478.)

* *

The valuation of natural gas leaseholds again comes to the forefront in the Logan Gas Company Case. (See page 480.) The speculative character of opinion evidence as to market value is criticized.

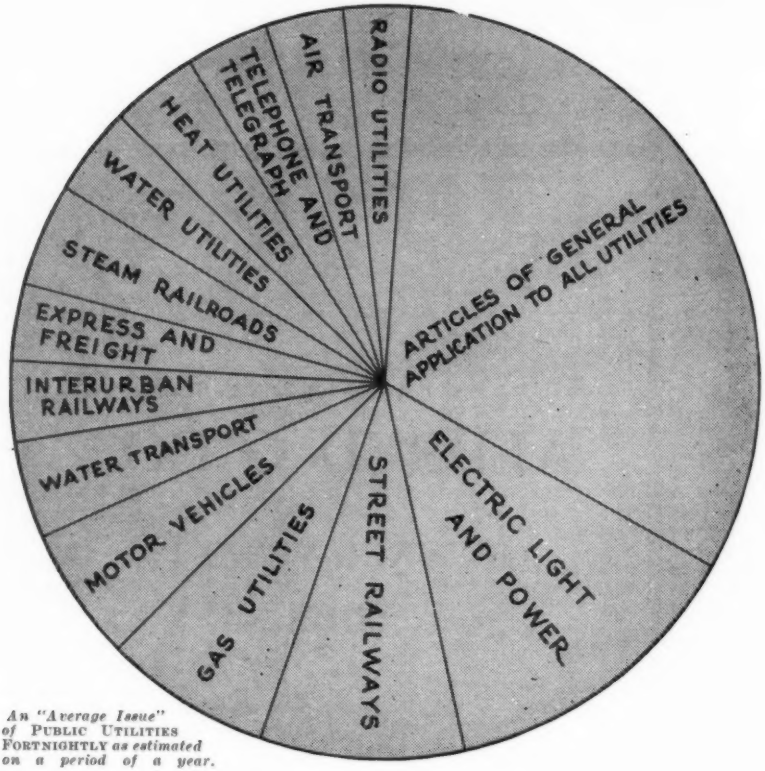
* *

The Oklahoma Commission has made certain amendments to rules prescribing standards for gas service. (See page 484.) These relate to deposits to secure future payment and interest on such deposits, as well as the matter of free extension of gas service to domestic consumers.

* *

The question of deposits and the establishment of credit also arises in the case of the Southwestern Bell Telephone Company, (see page 489), where the Oklahoma Commission expresses the opinion that the extension of credit is a matter of business judgment to be handled by the company's officers in a reasonable way.

(*Continued on page VIII*)



An "Average Issue" of PUBLIC UTILITIES FORTNIGHTLY *as estimated on a period of a year.*

AN agreement to keep accounts in conformity with a statute requiring that property items should be carried at actual cost is a condition which should be imposed upon a foreign utility asking for a certificate to do business within the state, in the opinion of the Vermont Commission. (See page 492.) The Commission gives its reasons for denying the application in one instance.

* *

DR. JOHN BAUER (whose article on "Adjusted Actual Costs" appears on pages 507-513 of this issue) has been engaged in private consulting practice in utilities matters for the past ten years, and has been engaged by the City of New York in nearly all the important rate cases—particularly the five-cent fare litigation. He received his Ph.D. degree from Yale in 1908.

* *

HARVEY HARMON is on the Public Service Commission of Indiana; his article (on page 495 of this number) points out some of the dangers of Federal encroachment into the field of state regulation—a subject on which a State Commissioner may well be expected to have both facts and opinions.

* *

SOMETIMES a friendly word comes to us from unexpected sources. Here, for example, is a commentary from a man who has long been connected with the Federal Trade Commission:

* *

"A STEADY diet of public utility facts is hard on the mental digestion. I know, for I have tried it. But, really, I think PUBLIC UTILITIES FORTNIGHTLY is serving them up as nearly predigested as possible. Somebody is going to inform the public in regard to public utilities. Recent numbers of the FORTNIGHTLY indicate that its share in the process will be notable."

—DR. WORTHY P. STERNS.

* *

THE next issue of PUBLIC UTILITIES FORTNIGHTLY will be out May 16th.

—THE EDITOR.

M A Y

Utilities Almanac

Reminders of Coming Events — *Notable Events and Anniversaries*

2	T^{h}	The first experiment with a refrigerating car was made by PARKER EARLE of Cobden, Ill., when he shipped strawberries to Chicago over the Illinois Central, 1866.
3	F	*¶If all truck drivers who block traffic were laid end to end, the line would reach from Washington, D. C., to Rochester, N. Y.—and motormen suggest they be laid that way.*
4	S^{a}	A new link in international communication was wrought in the laying of the London-Constantinople cable, 1858. The LEWIS & CLARK expedition left St. Louis, 1804.
5	S	The Chicago, Milwaukee & St. Paul Railroad was incorporated in Wisconsin under the name of "Milwaukee & St. Paul Railway Company," 1863.
6	M	The first busses (highly decorated and seating 15 passengers) started service in Paris under the patronage of the King, but proved a failure, 1670.
7	T^{u}	A governmental system of couriers was discovered in the feudal monarchy of Mexico by the invading Spanish adventurers, 1521.
8	W	J. P. MORGAN formed the International Mercantile Marine, 1902. The New York to Denver telephone line was opened, 1911.
9	T^{h}	The N. Y. Stock Exchange was thrown into an historic panic when E. H. HARRIMAN precipitated his fight with J. F. HILL and J. P. MORGAN, 1901.
10	F	Golden spikes were driven by THOMAS DURANT and GOV. LELAND STANFORD at Promontory Point, Utah, to complete the first transcontinental railroad, 1869.
11	S^{a}	Railroad traffic in the U. S. was tied up by the strike of the employees of the Pullman Palace Car Co. in protest against lowered wages, 1894.
12	S	Another milestone in the history of electric railways was erected when the train on HALKE and SEIMENS' road in Berlin attained the speed of 18½ miles an hour, 1881.
13	M	DR. WM. GILBERT, "father of electricity" and physician to Queen Elizabeth, published "De Magneto," one of the earliest records of electrical experiments, 1600.
14	T^{u}	*¶Plan now for the Exhibition and Convention of the N. E. L. A. in Atlantic City, May 31–June 7, 1929.*
15	W	GILBERT HARVEY gave a demonstration of elevated railway travel in a small car in N. Y., 1867. First telephone exchange in West Virginia opened, 1880.

"Public utilities are peculiarly subject to popular favor or ill will, and we believe that the only means of obtaining the friendly good will of the public is to deserve it."

—P. S. Arkwright.

From a Drawing by Abell Sturges

JOHN BAUER, Ph.D.

Economist and authority on rate-making problems of public utility companies.

—See Page 507

Public Utilities
FORTNIGHTLY

VOL. III; NO. 9 MAY 2, 1929

The PUBLIC UTILITIES AND THE PUBLIC

THE Michigan supreme court has decided a matter of the greatest importance at the present time because of the public interest in holding company operations.

One of the leading public questions just now is, what shall be done about our holding companies? Ought they to be regulated? Can they be regulated? If so, by whom should they be regulated—the state or the Federal Government? Do the present State Commission laws give the Commissions sufficient powers adequately to protect ratepayers from excessive charges by holding companies, if the charges are or should become excessive?

An investigation of holding company operation is now in progress by the Federal Trade Commission for the purpose of determining whether Federal regulation is necessary. Some State Commissions are asking for additional legislation to enable them to inquire into the reasonableness of charges by holding companies for services rendered to their subsidiaries by virtue of a contract between such parties.

The decision of the Michigan supreme court if sustained will be one of far-reaching importance. The action was brought for the purpose of ousting the Michigan Bell Telephone Company, a Michigan corporation, of its franchise on the theory that the business in the state is really being conducted by the American Telephone & Telegraph Company. The action was sustained by the court, which declared that the Michigan Company was no more engaged in conducting and carrying on a telephone business than was an ordinary station agent engaged in conducting and carrying on the railroad business of its employer. The court, however, held that a general judgment of ouster was not required; but the company was "ousted of the right to have credit in a computation of rates for payment to the American Telephone & Telegraph Company" under its general licensee contract.

THE American Telephone & Telegraph licensee contract is an agreement by which that company renders certain assistance to operating companies for which it originally received a compensation—4½ per cent of the annual gross revenue of each of the associated companies. This is now reduced to 4 per cent. The American Telephone & Telegraph Company is the licensor under this contract and the associate companies the licensees.

The question whether the compensation provided for in this contract should be allowed as an operating expense has been passed upon by a number of Commissions, the decisions not being in harmony. This contract was before the Supreme Court in the Southwestern Bell Telephone Company Case, P.U.R.1923C, 193.

Prior to that time the Commissions had asserted their power to investigate the reasonableness of this percentage charge. Some had approved it. Some had allowed it, although disapproving the percentage basis of computation. Some reduced the amount of the allowance, and some made an allowance for the service rendered on a per station basis. All Commissions recognized the value of the services rendered by the American Telephone & Telegraph Company. Although the New York Commission, in considering the reasonableness of the charge, said it could not substitute its judgment for the discretion of the directors of the telephone company's without proof of fraud or unreasonableness, the Commission held that it had power to limit an allowance for payment under the contract as operating expense.

The objection to the contract on the part of some of the Commissions was that, notwithstanding the value of the services rendered by the American Telephone & Telegraph Company, some more equitable standard of payment than a percentage of the gross revenue should be devised. Under the gross revenue system, an increase in the rates of the subsidiary company would increase the payment to the parent company, although it rendered no additional service.

The American Telephone & Telegraph Company licensee contract question went to the supreme court from a ruling of the Missouri Commission reducing the amount of the 4½ per cent allowance. The court said:

> "The important item of expense disallowed by the Commission—$174,048.60—is 55 per cent of the 4½ per cent of gross revenues paid by plaintiff in error to the American Telephone & Telegraph Company as rents for receivers, transmitters, induction coils, etc., and for licenses and services under the customary form of contract between the latter company and its subsidiaries. Four and one-half per cent is the ordinary charge paid voluntarily by local companies of the general system. There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in State Public Utilities Commission ex rel. Spring-

field *v.* Springfield Gas & E. Co. 291 Ill. 209, 234, P.U.R.1920C, 640, 125 N. E. 891.

"The Commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses, unless there is an abuse of discretion in that regard by the corporate officers. See Interstate Commerce Commission *v.* Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Chicago, M. & St. P. R. Co. *v.* Wisconsin, 238 U. S. 491, P.U.R.1915D, 706, 59 L. ed. 1423, L.R.A.1916A, 1133, 35 Sup. Ct. Rep. 869; People ex rel. Delaware & H. Co. *v.* Stevens, 197 N. Y. 1, 90 N. E. 60.

THIS was the case in which Judge Brandeis made his famous dissenting opinion in favor of the prudent investment rather than the value theory of rate making; but Justice Brandeis did not dissent as to the licensee contract ruling. On this question the decision of the Supreme Court was unanimous.

All of the judges but one concurred in the Michigan supreme court decision. In the majority opinion it is held that the Michigan Bell Telephone Company, 99.99 per cent of the common stock of which is owned by the American Telephone & Telegraph Company, is operating under a state charter giving it the right to carry on telephone business in the state and requiring that the business shall be managed by its directors. The court holds that these provisions are being violated to the injury of the public; that it is the American Company and not the Michigan Company which is carrying on the business; that the business is being managed, not by the directors of the Michigan Company but by those of the American Company. The court goes on to say that where a corporation is so organized and controlled and its affairs so conducted as to make it a mere instrumentality or agent or adjunct of another corporation, its existence as a distinct entity will be ignored, and the two corporations will be regarded, in legal contemplation, as one unit. The court says in this connection:

> "We think it is also apparent that a purpose of the separate entity is to avoid full investigation and control by the Public Utilities Commission of the state to the injury of the public."

IN a dissenting opinion Fellows, J., in commenting on the licensee contract, said that the original 4½ per cent contract between the Michigan Company and the predecessor of the American Telephone & Telegraph Company was entered into when that company owned not a share of stock in the Michigan Company; and that the business relations between the two companies were substantially the same after as they were before the American Company commenced to buy stock in the Michigan Company. He then calls attention to a number of cases in which the reasonableness of licensee contract had been under consideration by the courts including several supreme court decisions. He declares that the records in all of these cases are similar to the one before the court and that in many instances the same witnesses appeared; that in all of the decided cases, the American Telephone & Telegraph Company owned all or substantially all of the stock of the local company;

that in all of the cases this fact was pressed; that in all of these cases the validity of the 4½ per cent charge was sustained; and that in each of the decided cases this result was reached having in mind the rule that agreements between the parent and subsidiary companies must be closely scrutinized, and if procured by domination unfairly, should be disregarded in a rate-making case.

Each case, however, recognized that the men who furnished the money to run a business should have some reasonable say as to its proper expenditures and management. Judge Fellows saw no reason for reaching a different conclusion in the instant case than had been reached in the others. In the course of his opinion he says:

> "But forgetting the other cases and taking this record alone, I am satisfied that the state has signally failed to establish domination over the Michigan company in the offensive or illegal sense by the American Company. The contract which it is claimed was procured by domination is the same in essentials as the earlier contracts made when the American Company and its predecessor had no financial interest in the Michigan Company, and is substantially the same as entered into with companies in which it does not own the controlling stock. Speaking from this record and this record alone, I am satisfied the services performed under this contract are worth every dollar the Michigan Company pays."

JUDGE FELLOWS holds that if the Michigan Bell Telephone Company has ceased to function as a corporation of Michigan and is but a cloak or dummy through which the American Telephone & Telegraph Company is doing business in the state—a claim which he says the state has signally failed to accomplish—if it is no longer exercising its corporate franchises, it should be ousted *in toto*. Concluding his dissenting opinion he says: *

> "Proceedings in *quo warranto* should not be used to decide for the Commission and in advance of a proceeding before it, what evidence shall and what shall not be considered by it, what claims shall be and what claims shall not be considered by that body, if and when it has occasion to act in the future. Nor should such proceeding be used as a club; nor should this court enter a judgment which may under any circumstance be regarded as only a gesture. In my judgment this proceeding should be dismissed, leaving to the Commission to decide in the first instance, and subject to judicial review, what it will consider and what it will not consider in rate proceedings which may in the future come before it."

People ex rel. Potter *v.* Michigan Bell Teleph. Co. P.U.R.1929B, 455.

The disregard of the corporate fiction doctrine is an interesting one. The corporation is a fictitious person created by law to encourage the development of commerce. In our modern scheme of things, it is hard to conceive of what business would do without corporations. Hence the "corporate fiction" that is to say, the juristic dummy which the law treats as a natural person for purposes of commerce, is not to be lightly discarded. However there are well recognized instances where the law will pierce this corporate veil to look at the real men behind. Stated as a broad principle this will be done where the corporation is merely a sub-

*See full report of case on p. 455.

terfuge to disguise fraud or where a corporation once validly created in good faith is later used to perpetrate injustice. The lawyers call this latter situation, "the unconscionable use of a legal right."

No fraud was charged in the Michigan case, but the Court did say that one purpose was to avoid regulation. The concrete application of the disregard-of-corporate-fiction doctrine is very difficult and the state courts are by no means in accord as to when the corporate entity will be set aside. For instance the highest court in the land once set aside the corporate fiction of a holding company using its corporate entity solely to disguise the united control of two competitive railroads in violation of the Sherman Anti-Trust Law. On the other hand the supreme court of Alabama refused to disregard the corporate fiction of a company incorporated by two gentlemen who had just sold out their former business together with a covenant not to engage in competitive enterprise. They had created a new company solely for the sake of evading their personal agreement with the purchaser of their old business. When such learned authorities fall out it is difficult to say in advance of final adjudication just when a disregard of corporate fiction is warranted.

The Supreme Court Decides that New Yorkers May Ride in the Subways for a Nickel

At times the 7-cent fare for the New York city elevated and subway lines has seemed very near and at times very far off. The nickel fare now appears safe for a while. The railways have lost their case in the Supreme Court. The facts are complicated but the legal principles involved are simple.

The Interborough Rapid Transit Company operates both elevated and subway lines in the city of New York. It leased the original elevated lines from the Manhattan Railway Company. Under the Rapid Transit Act of 1891, amended some forty times, subways were constructed at the city's expense to be the absolute property of the city and to be regarded as part of its public streets and highways. The subways were built at different times under three contracts between the city and the Interborough Company or its assignor.

These contracts are elaborate documents but it is not necessary to master all of their details in order to understand the Supreme Court decision. It is sufficient to know that all of them provided for a 5-cent fare, and that the city under the Rapid Transit Act was given specific authority to enter into them.

The first two contracts were executed in 1900 and 1902. The third was entered into in 1913 under Amendments of the Rapid Transit Act permitting it. The original Public Service Commission Law requiring the Commissions to fix reasonable utility rates, was passed in 1907.

It was contended on behalf of the railways that the Public Service Commission Law abrogated the 5-cent

fare provisions in the subway contract, and required the Transit Commission to fix reasonable railway fares; that the old 5-cent fare had become confiscatory and that the railways were, therefore, entitled to a higher rate, notwithstanding the provision of the contracts. Between 1900 and 1928 several moves were made to secure an increased fare. Both the Transit Commission and the legislature were appealed to by the Interborough Company but without success.

On February 1, 1928, the Interborough Company proceeding under the Public Service Commission Law, filed with the Transit Commission new schedules purporting to establish a 7-cent fare on all lines and requesting permission to put the schedules into effect on five days' notice. On the morning of February 14th before the Commission had acted, the Federal court was asked for an injunction against any interference with the company's establishment of a 7-cent fare. Later on the same morning, the Transit Commission entered an order denying its authority to grant a new rate, and rejected the schedules. It also requested its counsel to begin suit in the state court to prevent the company from charging the 7-cent fare.

The company then filed a supplemental bill to restrain further proceedings in the state courts. An injunction against the Commission was granted in the lower Federal Court. It is this action of the lower Federal Court that the Supreme Court has reversed. Three justices dissented.

It will be seen that the Interborough Company, in order to secure a 7-cent fare, must show two things:

First, that the 5-cent fare contracts have been abrogated by the Public Service Commission Law requiring the Commissions to establish reasonable rates.

Second, that the 5-cent fare is confiscatory.

As to the contract matter, the court holds that the company should have first exhausted the remedy provided by the New York laws; that Federal aid could not be invoked unless it were shown that the Commission had taken or was about to take some improper action in respect to the new schedules, which the Court says was not shown.

As to the unreasonableness of the 5-cent fare, the Court holds that the Interborough did not establish its case. It was the company's claim that the elevated and subway properties were to be considered as a unit for rate-making purposes, a claim which the Court did not sustain. The importance of this ruling lies in the fact that it appeared that the subway operations were profitable to the company, but that operation of the elevated railways was being conducted at a considerable loss.

The Interborough also claimed that it is entitled to an 8 per cent return on the value of the subways, which are the property of the city. The Court said that such a claim was unprecedented and ought not to be accepted without more cogent support than the present record of the case disclosed.

Mr. Justice McReynolds in concluding his opinion says:

"The Transit Commission has long held the view that it lacks power to

change the 5-cent rate established by contract, and it intended to test this point of law by an immediate, orderly appeal to the courts of the state. This purpose should not be thwarted by an injunction. Upon the record before us, we cannot accept the theory that the subways and elevated roads constitute a unified system for rate-making purposes. Considering the probable fare value of the subways and the current receipts therefrom, no adequate basis is shown for claiming that the 5-cent rate is now confiscatory in respect of them. The action below was based upon supposed values and requirements of all lines operated by the Interborough Company treated as a unit and the effort to support it here proceeds upon a like assumption.

Gilchrist *v.* Interborough Rapid Transit Co. P.U.R.1929B, 434.

Bus Competition Is Forcing Economies in Railroad Management

OUR railroads are more and more concerned over increasing competition with the automobile and other forms of transportation. "The private automobile, the bus, and even the airplane," says J. J. Cornwell, general counsel for the Baltimore & Ohio Railroad, "have played havoc with passenger revenue." Fairfax Harrison, president of the Southern Railroad, says: "The automobile has taken from us a substantial part of our passenger revenue." George Hannauer, president of the Boston & Maine Railroad, says, "Lack of proper governmental regulation of motor vehicles gives them an advantage with which the railroads find it difficult to compete."

The railroads, however, have not thrown up their hands. By the introduction of economies and by increased efficiency of operation, they have been able, up to date, very largely to offset losses due to competition.

The Interstate Commerce Commission and the state regulatory Commissions were established on the theory that transportation companies and other public utilities have, or should have, a protected monopoly in their business; and that in consideration of this their rates should be regulated for the protection of the public. Without regulation, public utilities would not only be subjected to competition with companies of the same kind but also with other forms of business. Under regulation, they are still subjected to competition by other forms of business and this is particularly evident in the field of transportation. Both steam railroads and electric railways have been faced with automobile competition for a number of years, and this competition, especially in the case of the electric railway, has been very serious.

In the matter of rates, therefore, it would seem that the pressure of regulation upon transportation companies should not be quite as heavy as it once was, as Old Man Competition appears to be taking care of the situation pretty well. It is all right to say that theoretically a transportation company ought to receive a certain return. A State Commission may fix that return; but it cannot guarantee that it will be earned. Laws of economics cannot be altogether set

aside. The legislature of the State of New York cannot make the Erie Canal as economical a means of transportation as the railroad.

To the extent that steam and electric transportation is more efficient and economical than other forms of transportation it will survive. To the extent that automobile transportation is more efficient or economical than other forms of transportation, it will take their place.

But the more intense the competition, the less need there is for rate regulation whether by the legislatures or the Commissions.

Paving Value and Water Rights Allowed a Water Company in a Rate Case

JUDGE Joseph L. Bodine of the United States District Court has recently handed down an important decision in a rate case brought by the Elizabethtown Water Company, Consolidated. He holds that the company is entitled to earn on the increased value which its property has due to the necessity of cutting through or paving over mains in reproducing it. This amounts in the Elizabethtown case to about $778,000. He also held that the company is entitled to earn on the value of its sources of water supply amounting to about $1,000,000. Elizabethtown Water Co. *v.* Public Utility Com'rs. March 28, 1929.

The holding with reference to the value of paving is contrary to the rule adopted in a number of cases. The most recent decision to the contrary being that of the Master in the Worcester Electric Light Company Case, P.U.R.1929B, 1. In that case the Master held that no allowance should be made in a reproduction cost estimate for rate-making purposes of the expense of repaving pavements over conduits beyond the original cost, regardless of the enhanced value or subsequently free quantity of pavement over such installation. The Master in that case found that because of the pavement in the street there was an element of value in the conduit in addition to the cost to reproduce aside from paving, but he also found that the paving whether that which was there at the time of original construction, or that which was presently there did not belong to the company; that it did not add anything to the efficiency of the conduit and that it bore no part and gave no aid in enabling the company to perform the service to the consumer.

There are a good many cases in which it is said that their water rights have value and that the companies are entitled to earn a return on them, but it has usually been very difficult to prove the value of such rights.

The Customer Who Complains of Reductions in Rates

COMMISSIONER Frank B. Morgan says that there is no more persecuted Commission than the Alabama Commission. It seems that the Com-

mission has been engaged in the supposedly popular practice of reducing utility rates, but that, notwithstanding this, some of the most sarcastic and abusive letters the Commission has received have come from those who have been benefited by these rate reductions.

The Commission is probably philosophical about this, realizing no doubt that criticism of this sort is a well-established pastime, and that the vitriolic critic is always with us.

We know of a man who once went into the wilds of Canada on a fishing trip. The sport was good. The fish were plentiful; and when the fisherman came home he brought a nice lot of prize specimens, carefully packed in ice, to an old friend.

A few days later they met. "How did you like the fish, Joe?" asked the disciple Izaak Walton.

"Fine," replied Joe. "But you ought to have scaled and cleaned them." He meant it, too.

Probably the authors of these letters to the Alabama Commission thought that in addition to the fish they have received from the Commission, those fish ought to have been scaled and cleaned.

No matter what either Commissions or public utilities may do in the matter of providing better service or in reducing rates, they are bound to be subjected to adverse criticism. They are no different in this respect from anybody else who does constructive work. All progress has been made in the face of violent criticism.

In the words of James Whitcomb Riley:

"I've allus noticed grate success
"Is mixed with troubles more er less,
"And it's the man who does the best
"That gits more kicks than all the rest."

Bitter criticism of good work usually comes from men of sour dispositions and does not represent the sense of the great majority of the people. But if a good man expects to get through the world without being "panned" by some one, he has a few rude shocks awaiting him.

The Costs of Appraisals of Utility Property

VALUATION proceedings for the purpose of finding out whether we pay too much or too little for our gas, electric, water, telephone, or railway service, are pretty dry to the average man who is bent upon making his living and is occupied with market quotations, detective yarns, golf, and cross-word puzzles. There is, however, a human side to proceedings of this nature which the average man will always sit up and take notice of—he is always interested to know what these proceedings cost.

In a city of the middle west the question of the reasonableness of a proposed 10-cent street railway fare is up. The city is looking about for the services of an expert appraiser. Owing to the fact that the railway company was in the hands of a receiver who in 1925 had an appraisal made which cost $130,000, it will be necessary to expend only from $37,500 to $50,000 more to bring the appraisal up to date. To do this it will be necessary to keep a force of from 25 to 30 men busy for approximately

three months. A charge by a good expert engineer for supervising the work, of $100 a day and expenses would be deemed reasonable. Expert appraisers cost more than expert operators, but of course, expert appraisal is occasional and expert operation a permanent job.

It will be observed that the street-car rider, so far as the cost of these appraisals to the city is concerned, gets back at the city to some extent for this discriminatory taxation. Street-car riders who constitute only a portion of the inhabitants of the city are often taxed for the benefit of the city at large. These appraisal expenses incurred by a city are chiefly, if not solely, for the benefit of the street-car riders, but they are charged to the city at large, and all taxpayers must contribute.

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Initiation of Rate Changes Is Primarily a Function of Utility Management

ACTION on a bill which would have required approval by the Pennsylvania Public Service Commission of all changes in public utility rates has been indefinitely postponed, it is reported.

Several years ago the Massachusetts Department of Public Utilities opposed a policy requiring Commission approval of all increases in utility rates. In recommendations to the legislature the Department called attention to the fact that under a statute requiring certain utilities to obtain Commission approval for increases, there never had been a proceeding for this purpose up until 1917; but that when the war unsettled all values and costs, notably of the essential elements in the production of gas, revision of schedules became necessary. The Commission said that, in contrast, other companies were free promptly to readjust and increase their prices to meet the extraordinary and constantly shifting conditions; that this resulted in a natural misunderstanding by communities whose prices were increased by the companies serving them apparently at will, while neighboring communities had an opportunity to make inquiries and be heard before similar increases were sanctioned; that it lead to a vigorous effort in the legislature to enact a law requiring all increases in price to be approved by the Commission. The Commission said:

> "A review of the experience of the past three difficult years convinces the Commission of the importance in the public interest of placing squarely upon the managements of these utilities the duty of establishing their own prices or rates, subject only to revision by this Commission or such other public body as may exercise its functions. Any other policy is sure to result in a divided responsibility and a spiritless management. The true function of the Commission is that of a critic rather than of a manager. This is the aim of statutes relative to rates filed by railroads, streets railways, and companies engaged in the transmission of intelligence by electricity. What is needed, in the Commission's opinion, is not a requirement that all increases in prices or rates shall be approved before going into effect, but

provision for notice of any proposed changes, and power given to the Department to revise rates initiated by the company where justice to the public so requires, and thus remove the inequalities between companies which conditions have created."

The usual method of changing rates is this: A utility company files a new schedule with the Commission. If the Commission fails to act upon it within thirty days, the new schedule takes effect by operation of law. In many states the Commissions have the power to suspend these new schedules until the Commission has passed upon their reasonableness. If the Commission suspends the rates, the schedule is put on the Commission docket and a time set for a hearing, at which testimony is taken and the reasonableness or unreasonableness of the new schedules determined. If the rates are found reasonable, the Commission orders them put into effect; if not, the Commission fixes what it deems to be reasonable rates and directs that they be established.

Making Taxation Painless to the Tax Payer

NEW York State has a new tax of 2 cents a gallon on gasoline. This tax is to be collected by distributors. The law contains the following provision:

"No person shall sell, advertise, or offer for sale motor fuel, separate from the tax herein imposed."

A newspaper, commenting on the law, says the state aims to make the collection of the tax as painless as possible through a system of collecting the tax from the big distributors. In other words, declares the newspaper, when the motorist has to have his tank filled he need have no fear the gas station man will collect the tax separately from the gasoline price.

In some of the states which have a tax on gasoline, the filling stations, in posting their charges, are required to state how much of the charge is for gasoline and how much for the tax. The statement for example may be:

"Gasoline, 18 cents."
"Tax, 4-cents."

We know this is the practice in a number of states, and we assume the practice must be required by law, as otherwise the gasoline men might not bother to do it.

We do not pretend to understand exactly what the New York legislature meant by this provision forbidding the advertising and sale of motor fuel separate from the tax; whether or not it means, for example, that they cannot post a sign, "gasoline, 20 cents, tax, 2 cents." The secretary of a prominent automobile club is authority for the statement that it means precisely that. He declared:

"We are not going to have gas station men advertise 18-cent gasoline and then have the motorist find when he comes to fill his tank that he has to pay 2 cents more for the tax. That would make the cost of gasoline 20 cents a gallon instead of 18 cents. It would be unfair to advertise gasoline at 18 cents when it really cost 20 cents."

Well, as we say, we are not sure the secretary of the automobile club

is right in his interpretation of the law; but we can see some advantage in such a requirement.

In addition to allaying the fear that the station man will collect the tax in addition to the price of the gasoline, as pointed out by the newspaper, collecting the 20 cents as the price of the gas,—instead of collecting it as 18 cents for gas and 2 cents for tax—does tend to make the collection of the tax a little more painless. The motorist perhaps will merely think the price of gasoline has jumped 2 cents. He may soon forget all about the tax. Taxes of this kind are not painless unless they can be disguised so that the taxpayers will not realize they are paying them. If a motorist, every time he fills his tank, is reminded that he is paying a tax of 2 cents a gallon on his fuel, it is not so good. The object should be to get the motorist's money for the tax, without letting him know it.

It reminds us of the good old story of the new sea captain, who on his first trip over, bought a suit of clothes in an English shop and charged the bill against his company as part of his expenses. Upon his return to this country he was called into the auditor's office.

"What's this charge I see for clothes in your bill of expenses?" asked the auditor.

"Why," replied the captain, "that's a suit of clothes I bought for myself on the other side."

"But you can't charge that as part of your expenses," said the auditor, indignantly. "That's a personal expense. The company won't stand for it."

"Very well," said the captain, "I didn't know about that."

Upon his return from his second voyage, the auditor passed the captain's bill for expenses without protest.

"Ah, captain," said the auditor with rising inflection, "I notice you haven't put in any claim for clothes this time."

"No," replied the captain, "not as clothes. I got another suit over there and its in the bill all right. The only difference is I charged it under the heading of 'incidentals.'"

Of course, one disadvantage of taxation, disguised so as to be painless, is that the collector gets the blame. That is not bad from the standpoint of our public officials, but it is hard on the collector. He does the work and bears the odium. If the price of the tax on gasoline is not stated separately from the price of the fuel, it will not be long before the gasoline men will be getting a bad reputation as high chargers.

That is the way it is with the utility companies. They collect very large amounts of taxes from their customers for the use of the government. The government gets the benefit. The companies get the blame.

But there is no means of escape for the consumer from taxation however it is disguised. About all that can be done is to make the taxation as painless as possible.

Federal Encroachment Into the Field of Local Regulation

THE State Railroad and Public Service Commissions have for some time felt that there is a growing tendency to concentrate regulatory powers over public utilities in the Federal government, with a gradual weakening of the control of the states over their utilities. They believe that this is a grave mistake; that the public welfare would not be so well served by Federal as by state control.

¶ This view is very ably set forth in the following articles by Commissioner Harmon. He points out the advantages of state regulation and the disadvantages of Federal regulation, and the present encroachment of the Federal upon what has previously been considered state rights in the matter of regulation.

¶ His conclusion is that what is needed is honest administration of existing laws, rather than new laws; that existing laws are adequate for the purpose of regulation, even in the matter of holding companies whose operations have given rise to so much discussion at the present time.

By HARVEY HARMON

COMMISSIONER, PUBLIC SERVICE COMMISSION OF INDIANA

THERE seems to be more or less of a demand throughout the country for an increased Federal regulation of public utilities.

This demand apparently comes largely from a class of persons who believe that state regulation is breaking down. The burden of the hue and cry is that the big utilities control the State Commissions.

There is a more or less general insistence that the regulatory bodies have failed because of the burdens placed upon them, and that the only action that can be taken to improve conditions is for the Federal Government to assume the gigantic task of regulating the countless utilities throughout the United States.

A brief consideration of this claim makes it obvious that the persons suggesting such a change have never given serious consideration to the result of such a movement; surely, they have never thought of the chaos that would necessarily result before any Federal body or bodies could become familiar with operating conditions in the hundreds of thousands of communities served by utilities that would be affected by such regulation.

A cursory examination only, shows

that Federal regulation is preposterous on its face and entirely impossible of accomplishment.

IN the main, utility problems are largely local in their character. To regulate them properly always requires an intimate knowledge of local conditions. The usefulness of the state regulatory laws depends almost entirely on the closeness with which the regulatory bodies can approach the questions to be solved. Under most of the state laws as now formulated, hearings on utility questions are usually held in the locality affected by the matter to be adjudicated. Under most of these laws advance notice is necessary before a hearing can be held and a finding made. These notices go to the community or the persons affected, and as a result, a certain amount of publicity is always given before the hearing commences. Consequently local interest is aroused and local help is usually obtained in finding the facts about the matter to which the inquiry is directed.

The inquiries, under the prevailing practice, are more or less informal; at them the consumers may be heard as well as the utilities, and facts can be, and are, elicited from every source possible, so that a clear understanding of the points involved may be had by all interested parties. In this manner it is possible for rural communities to be reached and heard, and many times it is possible, even before the hearing, for the presiding Commissioner to bring about an amicable adjustment of what seems in the beginning to be a serious controversy. Fairly accurate knowledge is usually obtained of local conditions, and such information is indispensable to a fair and intelligent ruling on the issues in question.

SUPPOSE state regulation were abolished and Federal control substituted. What would become of the local influence? How far would the Federal examiner be willing and able to go in the informal manner necessary to be used in conducting such hearings?

Federal hearings are necessarily attended by the strictest formality; they usually follow a prescribed rule of practice, and instead of the complainants representing themselves, as now is the case, high-priced lawyers specializing in utility practice, would necessarily have to be consulted in even the simplest matters. If this result were brought about, the local contact would be largely lost. Such procedure would be impracticable, to say the least.

Instead of more paternalism, we need less. Like most of the states, the Federal Government now has too many Boards and Commissions. According to President Hoover, in a declaration made while he was still a cabinet officer, we now have more than two hundred Federal Bureaus, Boards, and Commissions, with authority to make rules and regulations that have the effect of law. Among these is the great Interstate Commerce Commission with authority over interstate and state transportation, telephones and telegraph; the Federal Water Power Commission, with jurisdiction over water power generally; the Federal Trade Commission, which reaches out into every

avenue of national corporate life and is now engaged in the tremendous task imposed upon it by the Walsh resolution, and other Commissions almost too numerous to mention. In addition, other regulatory bodies are either starting on a career of regulation or are immediately imminent. Among these are the Radio Commission, the Aerial Transportation Commission, the Federal Motor Bus Commission, and others of similar character, all clamoring to take their place with the great army of their predecessors which are now intermingling national and state regulation to such a degree that it is almost impossible to tell where the one ends and the other begins.

WHILE it would be impossible in an article of this scope to detail all the encroachments that the government has made on state regulation, a few of the more important ones might be mentioned briefly.

The restriction of the field within which state authority may act in regard to the railroads has been going on steadily for half a century as a result of action of Congress, of the Interstate Commerce Commission and of the Federal Courts. In 1877 the United States Supreme Court held that a state might regulate interstate rates on traffic originating or terminating in the state.[1] The Court changed this ruling in 1886.[2] Slowly, however, the Court changed its position until finally it adopted the fair return on fair value rule in 1898.[3] Up to this time and afterwards state regulatory authorities were supreme, subject only to the constitutional restraint of the fair value rule. Application of that rule required that the value of the property devoted to intrastate business should be determined. The duty of the state was to permit, from the intrastate business, a fair return on that value.[4] Congress up to this time evidently believed that it had no constitutional power of control over intrastate rates, and the first section of the act to regulate commerce in express language stated:

> "The provisions of this act shall not apply to the transportation of persons or property . . . wholly within one state."

For twenty years thereafter the Commission believed it had no power to act respecting intrastate rates. In 1912, however, the Commission made its first order departing from this rule, in the first Shreveport Case;[5] this was the first great encroachment. The Commission's order was later sustained by the United States Supreme Court.[6]

NEXT came the Transportation Act of 1920, with the added provisions of paragraph 4, of § 13, specifically empowering the Interstate Commerce Commission upon a finding of discrimination to prescribe intrastate rates. In the Wisconsin Passenger Fare Case[7] the present attitude of the Interstate Commerce

[1] Peik *v.* Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97.
[2] Wabash, St. L. & P. R. Co. *v.* Illinois, 118 U. S. 557, 30 L. ed. 244.
[3] Smyth *v.* Ames, 169 U. S. 466, 42 L. ed. 819.
[4] Minnesota Rate Cases, 230 U. S. 352, 57 L. ed. 1511.
[5] 23 Inters. Com. Rep. 31.
[6] Houston, E. & W. T. R. Co. *v.* United States, 234 U. S. 342, 58 L. ed. 1341.
[7] 59 Inters. Com. Rep. 391.

Commission towards intrastate rates began to be developed. This decision established the principle that the Federal Government might raise an intrastate rate upon the ground that the intrastate shipper was not bearing his fair share of supporting the carrier engaged in moving both interstate and intrastate traffic. It is significant that in this order no showing was made as to what the Wisconsin rates were producing by way of return on the value of the property used in moving the Wisconsin intrastate passenger traffic. This objection was urged before the United States Supreme Court, but the Court held it to be unnecessary to consider the two classes of traffic separately. Accordingly, it seems to have come about that while rates prescribed by state authorities are subject to injunction if they do not yield a fair return on the property value allocable to the intrastate business; nevertheless, such rates which do yield a fair return may be set aside by the Interstate Commerce Commission for the purpose of increasing the general revenue of the carriers.

Following this ruling, the Interstate Commerce Commission made orders prescribing intrastate rates, passenger or freight, or both, in the following states:

Arkansas, Arizona, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, South Carolina, Texas, Utah, and Wisconsin.

So far as these orders fixed passenger rates, they remain in force. As applied to Indiana, with a statute prescribing a 2-cents fare still on the books, a $3\frac{6}{10}$ cents fare is charged. So far as they related to freight rates, most state-made orders were dissolved following the so-called cooperative agreement of 1922 between the Interstate Commerce Commission and the State Commissions. All of these orders displacing state-made rates were entered without any showing that the state rates were inadequate to compensate for the interstate service which they were supposed to cover, other than the showing that the Interstate Commerce Commission had allowed the Ex-parte 74 increases and that like increases had not been made intrastate.

THE power of the Interstate Commerce Commission to set aside intrastate rates has been extended to rates on electric railways fixed by franchise.[8] With respect to the construction and abandonment of the lines of interstate railroads, and with respect to the issuance of their securities, Congress, by paragraphs 18 to 22, of § 1, and by § 20-a of the Interstate Commerce Act, clearly intended to divest state authorities of jurisdiction, and to vest the same in the Interstate Commerce Commission, subject, however, to the exceptions contained in those provisions of the statutes, and subject also to the reservation to the states of police power contained in paragraph 17 of § 1. The Interstate Commerce Commission has accepted jurisdiction of these matters literally, and within the last year has, in the state of Indiana, al-

[8] Ohio Rates, Fares and Charges, 64 Inters. Com. Rep. 493, 266 U. S. 474, P.U.R.1925C, 388.

NOTHING will produce worse service than to attempt to transfer local problems to absentee solution at Washington. If our democracy will stand at all, it will stand upon the local responsibility. Nothing could be a more hideous extension of centralization in the Federal Government than to thus undermine the State Utility Commission and state responsibilities."
—HERBERT HOOVER.

lowed the Central Indiana Railway, running from Muncie, Indiana to Brazil, Indiana, and not engaged in interstate commerce, to abandon its service and tear up its tracks, thereby causing several flourishing communities in the state to be without railroad transportation; this was done in the face of expressed opposition of the Indiana regulatory body.

As to utilities other than railroads, the Interstate Commerce Commission has been inactive, even where vested with jurisdiction. While but a small fraction of the telephone service of most companies is interstate in character, § 20 of the Interstate Commerce Act requires the Interstate Commerce Commission to fix rates of depreciation for such companies, together with all other carriers subject to that act, for their several classes of property. When these rates have been fixed, it would seem that depreciation, as computed thereunder, will be an operating expense, the reasonableness of which no State Commission can inquire into. Under the report of the Commission already made, regarding Depreciation Charges of Telephone Companies,[9] the State Commissions apparently will be given an opportunity to make their recommendations as to what rates of depreciation ought to be prescribed by the companies operating in their respective states. What the effect of their recommendations will be is, of course, entirely problematical. The states formerly held to the view that their regulatory bodies had a right to say whether or not intrastate train service might be abandoned; this has also been changed, and the Federal Government now assumes jurisdiction over the question of whether or not trains shall run.

In the past, railroading was like any other class of business, in that the owners of railroads took their chances on whether or not they would receive a return as the result of their investment. The railroad owner is now virtually guaranteed an adequate rate of return on his investment through the help of the Federal Government.

THE Federal Trade Commission, while engaged in many branches of work, has recently been given an additional task which apparently will increase largely the Federal encroachment on state regulation. The Walsh resolution to investigate utility practices, and in the beginning, Commission practices as well, has been referred to this Commission. Last year

[9] 118 Inters. Com. Rep. 295.

this Board issued a 225-page questionnaire to various corporations and to many utilities whose property and interests are entirely held within the state of their creation. It was, and is, insisted that these questionnaires be answered.

Can this be construed as a forerunner of an act to be later passed by the Federal Congress, looking forward to the control of holding companies? If so, will this act provide means also for obtaining control and jurisdiction over the operating companies as well?

If this is a possible result, a greater encroachment on the powers of the state regulatory body could hardly be imagined, and conflict in authority between state and Federal bodies is inevitable.

THE Water Power Commission was undoubtedly created to fill a great need; it was intended to do, and is doing, a great work; but until its powers are more clearly defined by the passage of time and until state legislators grant to the several state regulatory bodies more clearly defined powers than they now have, a conflict in authority and encroachment by the one on the other seems to be a foregone conclusion.

AMONG the interesting developments of the national attitude toward the regulation of state utilities, was the proposal for the government to fix the price of all electricity produced at Muscle Shoals, Alabama.* This power, of course, is produced by a government-owned utility; however, it is sold to private consumers. When produced, the government energy flows into a power pool. This energy can not be separated from that produced by private ownership after the intermingling has once been accomplished. Therefore, but one of two results will probably be accomplished; either the government will go into the business of supplying electrical energy to private consumers on its own account, or it will assume jurisdiction of the privately-owned transmission lines and compel the delivery to private consumers at a price fixed by it of the intermingled energy.

If carried to its logical conclusion, this means ultimate government ownership and nothing less.

The same principle applies, although in a slightly different way, as relates to the government fixing the price of water in some of the large irrigation and urban water supply projects now in the process of development in the far West.

THERE are certain classes of utility service in which conflict between Federal and state authority seems to be impossible. By the character of service, radio transmission and aerial traffic can not be regulated by the several states. Radio reaches out to all parts of the world; it does not stop at state lines; the only means of regulating it must be vested in the Federal Government.

The same condition is true in a limited manner of aerial transportation. State lines are not boundary lines to the air man. While theoretically the land owner owns his land from the centre of the earth to the heavens above, yet the great air-liners

* The Muscle Shoals Resolution (S. J. 146).

of the future must undoubtedly have the right to pass and repass through the air according to well-defined plans, without any restrictions other than those imposed by the Federal Government. Any attempt on the part of the several State Commissions, unless they act in unison, to interfere with radio transmission or aerial transport, would undoubtedly lead to endless confusion.

In a more limited sense the same thing is true of interstate motor bus operations. These busses pass over the fast-growing, hard surface roads from one end of the country to the other. To compel them to take out licenses and secure permits in each of the several states with their different forms of regulation and their different ideas of traffic rules, would be to place too heavy a burden upon these transportation companies.

It would seem that the only safe way these questions can be solved is to place jurisdiction over them in the hands of the Interstate Commerce Commission, or some other similar body, which shall in conjunction with the several State Commissions work out the solution, with the Federal body being the court of appeal in case of a disagreement between the state Commissions involved.

It seems elementary, under the Constitution of the United States, that every state should exercise absolute control over affairs which are local to that State, and that questions of this nature should be determined by the several State Commissions. On the other hand those questions which are national in their scope, or operations that extend beyond the confines of the state, and are not local in character to the state, should be heard and determined by Federal instrumentality.

For the last few years the tendency of Federal Government has been to encroach slowly and steadily upon the field of the State Commissions and to curtail their powers. The Interstate Commerce Commission, great body as it is, has assumed jurisdiction in cases too numerous to mention. Its activities have been increased until it does not seem humanly possible for it to perform these duties. Little by little the powers given the several State Commissions are being usurped and trimmed away, and powers of this Federal Commission have been increased, until no one can tell with any degree of certainty where the one begins and the other ends.

The Water Power Commission, if it follows the natural trend, will take the same course. The Federal Trade Commission has already had added to it, and is assuming and exercising, functions which apparently lead inevitably to partial Federal control of all operating utilities.

On December 20, 1928, a bill was introduced in Congress, providing for an amendment to the Interstate Commerce Commission Act, looking toward the regulation of interstate motor busses. This bill provides that all interstate busses shall make application for certificates to operate to the Interstate Commerce Commission; such applications are referred to the Commissions of the several states through which the motor bus route passes. If these states are unable to agree on the certificate to be granted, the application goes back

to the Interstate Commerce Commission, and the certificate of convenience and necessity is issued by it.

On December 22, 1928, a bill was submitted to the Senate which provided for the appointment of a Federal Commission to regulate telegraph, telephone, cable, and radio—quite an ambitious program for a new Commission to live up to. Legislation is about to be formed to control air traffic. What form this will eventually take is impossible to forsee at this time, but it will probably be the creation of other Boards and Commissions. These new bodies and others to come, added to the two hundred already in existence, will certainly serve to provide all the regulation necessary.

ADVOCATES of governmental control and public ownership point to the supposition that state regulation has broken down, and cite as one evidence of this the recent development in utility mergers and utility consolidations.

It is true, in the field of public utilities, that the Bell Telephone Company controls about three-fourths of the telephone wires; the Western Union controls the majority of the telegraph service; the International Telegraph & Telephone Company is reaching out to control the cable, radio, telegraph and telephone service abroad. Six corporations in the electric field now produce one-half of the electricity consumed in the United States, while six corporations control one-third of our developed water power.

These consolidations are not, however, the result nor can they be attributed to the breaking down of state regulation. They have come about as a necessary result of changing conditions, and state regulation has not contributed in any way to their being.

The Department of Commerce, with President Hoover as its head, has made an intensive study of the effect of state regulation of utilities. In an address before the National Lighting Association in June, 1920, the President stated that he believed that the Public Service Commissions of the various states were proving themselves fully adequate to control the utility situation, and that the laws of the individual states were sufficient to protect both the public and utilities alike. Quoting from this speech he said:

> "Nothing will produce worse service than to attempt to transfer local problems to absentee solution at Washington. If our democracy will stand at all, it will stand upon the local responsibility. Nothing could be a more hideous extension of centralization in the Federal Government than to thus undermine the State Utility Commission and state responsibilities."

IT is currently reported (with what degree of truth this writer is unable to state), that one of the new assistants to the President is being charged at the present time with the responsibility of studying what Boards and Commissions now existent in Washington, can be eliminated without injury to the public service. It might be suggested that some of the so-called Federal regulatory bodies would never be missed from the state standpoint.

State regulation has not broken down, although frankly, it has been

hampered in many instances by the utility companies themselves. In their zeal to sometimes try to dictate the appointment of Commissioners, they have been known to influence legislation which they felt was not entirely in their favor. This has been recently true in the state of Indiana, and every attempt of this kind undoubtedly goes far towards weakening the public confidence.

The experimental stage and first period of development of the utility industry has passed; the time for rapid progress has arrived and the most profound reflection and foresight on the part of the regulatory bodies is essential in the furthering and stabilizing of such progress. Time has shown the weakness of many of the regulatory laws and the various state legislators have made necessary changes and will make them, looking forward to the strengthening of these laws.

It makes no difference how many laws are passed or how sound these regulatory laws are, if the right kind of men are not selected to administer them.

If utility companies name Commissioners, the result will inevitably be bad. If Commissioners are subject to recall at the whim of the appointing power, the result will be equally disastrous.

Commissioners should be encouraged in doing good work; their terms should be lengthened. Men who are tried and found true in the public service should be reappointed regardless of political or utility preference.

The regulatory laws as they now exist, in my opinion, are adequate to cover the field; if they are administered by honest, fearless men who know their business—and no other kind should be appointed—they will serve the interests of all alike. I am satisfied that the State Commissions are fully vested with authority to regulate the utility business without the intervention of the Federal Government, even where this business crosses state bounds and goes beyond state lines. I say this after exhaustive study of this subject made in the case which was recently assigned to me for hearing and finding.[10] This petition had to do with the establishment of a new million kilowatt generating plant near the city of Chicago. Four companies were involved in the petition, two in Indiana and two in Illinois. Seventy per cent of the stock was owned in Illinois and 30 per cent in Indiana. The evidence showed that the energy generated in the several plants of the individual companies was inadequate to supply the demand, and could only be furnished by the building of additional units at excessive costs to the several owners. On the other hand, by the erection of a proposed single large unit located at a favorable point adjacent to the state line between Indiana and Illinois, where water power and fuel would be available at a minimum cost, energy could be generated to sufficiently supply the petitioning companies at a cost far below that which would be incurred by the individual plants.

Under the proposed plan the output of this large unit was to be apportioned to the four companies in the

[10] *Re* State Line Generating Co. (Ind.) P.U.R.1929B, 97.

ratio of stock owned by each; the operating expenses to be borne in the proportion of the current delivered. Tentative contracts between the companies were submitted for the Commission's approval.

While the evidence developed the fact that the Indiana companies were minority stockholders and the Illinois companies would control the policy of the organization, yet this Commission felt that the laws of this state gave them authority to approve the contracts submitted, and at the same time enable the Commission to reserve the right to fix the rate of return, the rate of depreciation, the amount of the working capital and the right to inquire into all phases of the operation. If this authority exists, surely no more regulation will ever be needed, inasmuch as when the energy goes into Illinois for distribution it will become a part of the current sold and distributed locally by the Illinois companies and be subject to the control of the Illinois Commission.

MUCH attention has been given both by the Federal Congress and the state legislators of several states to the so-called holding companies, and some question has arisen in the minds of Federal legislators as to how best to curb the tendencies of these companies to acquire stock and control utility operations.

The development and growth of utility companies has made it necessary that corporations be permitted to hold stock in other corporations; hence the inception of the holding companies. Such companies have come to be considered more favorably from the standpoint of economical management and more favorable handling of securities, and are not now being regarded as impediments to commerce as heretofore. While holding companies control the stock of many larger utilities, under the state laws, I believe that the State Commission can, if it will, always obtain the information it needs to determine values and fix rates, or for any other purpose.

Under the Indiana law utilities are required to submit books and papers for the inspection of the state regulatory body, and subpoenas can be issued for any paper desired, with a penalty attaching if the paper or information is not produced. It might be suggested that if the orders of the State Commission are not followed so far as the furnishing of information wanted is concerned, the State Commission has two remedies.

First, it may have the utility punished as provided by the law.

Second, it may withhold its order until the wanted information is forthcoming.

IN the main, Federal encroachments have been brought about by natural conditions; they are more fancied than real. There is a clearly defined field for each kind of regulation.

If President Hoover is right in his contention that there are too many Boards and Commissions now doing business in Washington, he will undoubtedly sort the wheat from the chaff and cast aside the undesirable, having in mind always that by the Federal Constitution, state questions should be solved by state tribunals and questions national in their scope should be solved by national agencies.

Remarkable Remarks

EDWARD N. HURLEY
Formerly Chairman of the Federal Trade Commission.

"If it (the Government) ventures to regulate business, then it must do so by law—by rule. And no one knows what the rules ought to be."

❦

A school boy's attempt to use the word "diadem" in a sentence.

"People who drive onto the railroad crossings diadem sight quicker than those who stop, look and listen."

❦

THOMAS A. EDISON
Inventor.

"A private monopoly which was foolish enough to put in high rates would only bankrupt itself, for no one would buy the power."

❦

HEYWOOD BROUN
Columnist and essayist.

"I purpose to buy railroad bonds. Specifically the bonds of roads which are not doing very well. It would be a thrilling thing to stop a train upon a defaulting road and order the passengers all to alight, with the curt explanation, 'Get out of that smoking car! The right wheel belongs to me.'"

❦

PAUL S. CLAPP
Managing Director, National Electric Light Association.

"Last year only 39 per cent—and it was a very high year—of the energy requirements of the country came from water."

❦

RAYMOND F. TOMPKINS
Author.

"The rugged founding fathers of the horse car did not want (technical) books; they wanted franchises. They did not even want account books."

❦

GEORGE ROTHWELL BROWN
Newspaper Columnist.

"The telephone has now been perfected to such a point that you can call a man a liar by wire, hang up the receiver, and make a getaway before he hears you."

❦

JOHN SPARGO
Author, lecturer and former Socialist.

"The modern public service corporation with its stock owned by tens of thousands of people, many of them wage-earners, producing and selling a primary necessity of life, a monopoly in fact, is essentially socialized."

❦

RANULPH KINGSLEY
In a letter to the "New York Times."

"Yes-men have poisoned American business for so many years that a human antidote has recently been evolved against them. He is a rough, crude fellow. Yet a number of downtown corporations are developing at least one of him in self-defense. He is called,—yes, he really is called—the company's No-man."

MAJOR-GENERAL JAMES C. HARBORD
President, Radio Corporation of America.

"Our daily conduct from the cradle to the grave, including what we eat and drink, what we buy and sell, what we read, what we may see at the theaters, how our wives shall divorce us, and what we shall hunt and fish, whether we shall see prize fights and go into physical training; how our mothers shall be advised in case we are not wanted in the world, or how our arrival shall be expedited if we are desired, are still matters which now receive statutory treatment by Congress. The favorite instrument for such official meddling is the Commission."

JAMES J. WALKER
Mayor of New York City.

"The 5-cent fare we have. The 5-cent fare we will hold, and that's the last, I hope, I'll ever have to say on this subject."

ED. HOWE
Sage, philosopher and retired newspaperman of Atchison, Kansas.

"I greatly admire a busy man who is able to get away with it politely and efficiently. The other day I watched a busy and successful man in operation. It was a much more interesting performance than Al. Jolson singing Sonny Boy."

ROWLAND B. JACOBS
President, The New Hampshire Manufacturers' Association.

"The manufacturer of transportation is in no different a position than the manufacturer of merchandise. There is a limit as to how far he can go in operating departments at a loss, and both the manufacturer and his customers must be reasonable in all of this."

PRESTON S. ARKWRIGHT
President, Georgia Power Co.

"The price of electricity has constantly decreased through the whole history of the electric light and power industry. There has never been an increase in the average price excepting on three occasions, all of which have been off-set by decreases."

RAYMOND F. TOMPKINS
Author.

"The horse car railways were as roundly denounced in the fifties by public, press, and pulpit as were the turnpike roads and the steam railroads before them, and the automobiles after them."

HOWARD VINCENT O'BRIEN
Critic and writer.

"He (the Business Man) has no appreciation of free verse or cubist painting or cacophonous music; he is not, in short, what is known to the Greenwich Village mind as an 'interesting' man. He is not to be classed among the people who really do things."

JOSEPH L. BODINE
Judge of the United States District Court, District of New Jersey.

"A starving utility company cannot meet the needs of a growing community."

"Adjusted Actual Costs"

The Economic Reasons for Adopting a Fixed and Non-Variable Rate Base for Future Rate-Making Policy

By JOHN BAUER

DIRECTOR, THE AMERICAN PUBLIC UTILITIES BUREAU

PROFESSOR Harry Gunnison Brown, in the March 7th number of PUBLIC UTILITIES FORTNIGHTLY, supported "present costs" as the proper basis of rate making—presenting his analysis upon what he considers fundamental economic grounds. While his points merit careful consideration, he failed to present the principal issue as it stands today, either in the realm of economic discussion or in the field of practical rate making. He also ignored fundamental facts, and assumed conditions and economic consequences that have little reality in their bearing upon public policy.

PROFESSOR Brown presents the issue between "reproduction cost" and the "prudent investment" theories of valuation. In defining the theories, he states that the advocates of the reproduction costs theory "contend that the rates permitted should be high enough to allow a reasonable per cent of return on the money that would now be required to construct a plant capable of rendering the desired service; they do *not* contend that the plant should be valued at what would now be needed to duplicate the plant precisely."

But Professor Brown is in error as to this view. The reproduction cost theory today does involve plant valuation of the properties actually used in service; the actual, not a hypothetical, plant is to be valued under the decisions of the Supreme Court of the United States.

In regard to the prudent investment theory, Professor Brown explains that its proponents "believe in a valuation on the basis of construction cost at the time the plant of a public utility was actually built; they do *not* contend, however, that these costs should include improper expenditures for construction or money spent unwisely or with inexcusable prodigality."

Here he is setting up a straw man. No one who understands the great economic changes of the past fifteen years and the court decisions, would today argue for prudent investment as defined by Professor Brown. The intelligent opponents of reproduction cost are meeting present-day realities, and are seeking to establish through legislative action a basis of valuation that will serve effectively for future rate-making policy. Nor have they the purpose of forcing rates down against the interest of the investors, or to prevent increases where ad-

vances are reasonably needed. They are interested, however, in sound public policy which is fair to investors, but which can be effectively administered, will preserve the financial stability of the companies, and will provide for systematic expansion of the properties according to the industrial and social needs of the public, notwithstanding future changes in price levels or cost of construction.

THE critics of reproduction cost object to it, first, because it would perpetuate for every company a variable and fluctuating rate base, whose amount could not be fixed at any time by exact facts and could be determined only by appraisal. Every important attempt to adjust rates upward or downward would arouse a conflict of interest between the company and the public, and would result in drawn-out proceedings, enormous expense of litigation, and unsatisfactory results. The work of rate making practically could not be administered by a commission that has to deal with hundreds of properties operated under greatly varying conditions.

A system might be established so as to start with actual costs, and then apply index numbers for the adjustment of the valuations with changing prices; that could be satisfactorily administered. But to adopt such a system, would require special legislation; it could not be effected under the present law, which requires actual valuation of the property under present-day conditions, and would not permit the use of index numbers as a regular feature of administration.

As ordinarily understood under the law, reproduction costs cannot be satisfactorily administered, nor could the conception of a substitute plant as specifically discussed by Professor Brown. To determine the present cost of such an up-to-date plant, capable of furnishing the desired service, would inevitably lead to even greater guess-work and conflict of interest than to fix the reproduction cost of the actual properties,—and this is one of the reasons for the rejection of the idea by the supreme court.

THE second basic objection to reproduction cost is the financial instability which it would impose as an unavoidable part of rate making. That prices will rise and fall in the future, there can be no doubt, as Professor Brown adequately indicates. If all the properties had been constructed through stock issues, there would be no financial objection to reproduction cost; the increase and reduction in valuation would, in general, merely reflect the change in the purchasing power of money (especially if the adjustments were based upon index numbers). The fact is, however, that the ordinary railroad made about two-thirds of the actual investments through bonds and fixed-return securities, and only about one-third through common stock which is capable of receiving returns adjusted to changing price level. The average utility has about 75 per cent of fixed-return investment, as against 25 per cent of common stock investment. Consider this fact together with the changing prices, and then inquire what will be the financial consequences of adopting reproduction cost

One of the Consequences of Adopting Reproduction Costs as the Rate Base:

"The average utility has about 75 per cent of fixed-return investment, as against 25 per cent of common stock investment. Consider this fact together with the changing prices, and then inquire what will be the financial consequences of adopting reproduction cost as the rate base. Is it not clear that during rising prices the monetary return to the common stock would be far out of proportion to the change in the purchasing power, and, conversely, during falling prices there would be a like cumulative decrease? The system would thus produce inordinate speculation during one period, and financial stagnation during another."

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BUT can we regard the financial instability inherent in the reproduction cost system, with the equanimity preserved by Professor Brown?

The critics of reproduction cost regard the utilities as public instrumentalities, and believe that regulation should have primary regard for financial stability, to prevent both speculation and financial paralysis. They argue, therefore, that a desirable rate base should, first of all, meet the requirements of financial stability. It should provide for just dealing with investors, but should preserve constantly the credit of the companies so as to provide under all conditions for the expansion of capital as needed for the public service.

To meet present-day conditions, the opponents to reproduction cost do not go back to prudent investment as defined by Professor Brown.

First of all, they make a sharp distinction between present properties and future investments. As to present properties, they realize that there has not been a fixed limitation placed upon the returns in relation to financial structure, and that the prudent-investment basis would now impose an unwarranted loss upon the common stockholders.

But they realize, also, that the full adoption of reproduction cost would still prevent two-thirds or three-fourths of the actual investors from obtaining any adjustments to meet the shift in basic economic conditions, and that it would result in greatly pyramiding the gains for the common

stockholders. Their position, therefore, is to meet reasonably present-day conditions considered in relation to desirable future policy. They would place upon all present properties a valuation which would remain fixed for the future; it would not be variable either with changing prices or other conditions of operation, and would be fully maintained through adequate charges for future depreciation. In fixing this amount, they would make an adjustment on the stockholders' investment in accordance with the change in purchasing power of money, but would not allow an adjustment for bonds and preferred stocks, because these investments would receive no benefit. They would realize, however, that reasonable compromises would be necessary to meet present-day conditions of the various properties. They would cut through the tangle of valuation once for all, and then deal with definite sums for the future. They would make all the necessary adjustments in the initial valuation to deal fairly with past investors and to meet the requirements of the law in fixing the "fair value" in connection with the stated policy of future rate making.

THE difficulty in fixing a definite and nonvariable rate base appears only in the existing properties. If, however, once and for all, a definite sum were adopted and maintained for each property, then all additional future investments would merely be added to the initial amount. If the law made plain that as to future policy the rate base for each company would consist at any time of the initial valuation plus subsequent actual investment, and that the properties must be fully maintained out of rates paid by the consumers, then rate adjustments could be promptly made at any time upon a definite basis. The amount of the "fair value" upon which a return must be allowed, would be shown by the accounts and the records of the Commission. The rights of the investors and the public would be clearly defined and exactly stated. The adjustment of rates upward or downward would be a simple administrative matter.

Such a rate base as here briefly described, would have to be provided for by statute to fix the policy for future rate making; it could probably not be established by independent action of a Commission. The whole subject should be considered on broad grounds of policy, and legislation adopted accordingly. It is submitted, however, that such a rate base as here indicated would deal fairly with investors as of the present time, and would provide for financial stability and effective rate making for the future. It would fix the rights of the investors and the obligations of the public, and would eliminate conflict of interest in any rate adjustment or other act of regulation. And it would assure the expansion of the properties according to the needs of the service.

PROFESSOR Brown admits the financial instability connected with reproduction cost, but practically regards the fact as of no particular consequence. In substance, his position is that the same situation prevails in other industries, so why not in public utilities?

What harm is there, anyway, if the

common stock obtains huge returns, or if a company is forced into a receivership due to the basis of rate making?

It would take us too far afield to present adequately the conditions encountered when an important utility becomes insolvent. Has Professor Brown ever lived in a large city whose street railways were in the hands of a receiver for several years? Did he make note of the character of service? Were the properties adequately maintained? Were additions and extensions made as needed for proper service? Were the conditions in any respect satisfactory from the public standpoint?

The chaotic state of affairs can easily be visualized, if through our very basis of rate making we forced financial disorganization upon the light, power, gas, transportation, telephone, and telegraph industries during a period of falling prices. Why not avoid such confusion by intelligent provisions in our system of regulation?

PROFESSOR Brown assumes that there is no difference so far as the public is concerned between the utilities and ordinary business during periods of shifting prices. But there are at least two important differences.

First: ordinary business is less extensively financed through fixed-return securities; hence there are less financial distortions due to price changes; fewer insolvencies during falling prices.

The second difference is more far-reaching; a community is usually dependent upon a single company for any given utility service, while in an ordinary industry it has competitors available.

Take electricity, and shoes, for instance.

There is but the single electric company, and its insolvency will seriously affect the service of everybody. But if one manufacturer of shoes fails, there are plenty of others to keep the community supplied.

This is a general difference which, we submit, should be recognized in considering future policy.

PROFESSOR Brown in his entire approach of rate making, does not have sufficient regard for the underlying differences between a utility and ordinary business. He understands, of course, that the utilities are monopolies, but he would still treat them under competitive forms. He attaches no particular weight to the fact that a utility is vested with a special public interest which has been recognized for many decades in our fundamental law and public policy. It is this special interest which distinguishes a utility from ordinary business, and justifies or requires different treatment. The objective of regulation is not to effect the conditions which generally prevail in competitive business, but to establish desirable standards in dealing with public functions.

Keeping in mind the public character of a utility, let us inquire why there is any need on economic grounds to modify the rate base with changing prices? Professor Brown intimates that there would be serious economic consequences if such modifications are not made; but he does not prove that there actually would be

such results; he merely assumes them, and thus argues for reproduction cost to avoid them. He has set up assumptions for fact, and has ignored the realities to be encountered.

Assume that such a rate base as we have described, has been adopted for the future. What are the serious evils which would follow from our refusal to change the rate base with future price variations?

Take the gas plants in two cities, each property with a monopoly in its territory. The rates in each municipality will be made independent of the other; the costs in each case will control, and will have no bearing upon the rates in the other. If additions and extensions are made in one, the amounts would be merely added to the rate base, and the rates then would be fixed on a general level to produce the required return on the entire capital sum.

How could this affect conditions in the other city?

Rates there would be fixed according to local circumstances; as new properties are installed, the cost would be added to the rate base, and the required return would be provided accordingly. What serious economic consequences can arise from this state of affairs?

PROFESSOR Brown conceives that there might be (and there would be) grave dislocations of business if, when prices have changed, the rates in the one place were based upon a different level of plant costs than the rates in the other. But, what are the facts? Where is there a dislocating factor of sufficient importance to justify the adoption of reproduction cost, notwithstanding the administrative and financial difficulties? There does not seem to be any.

The level of utility rates at most would constitute a minor element in the relative total business costs of two places. The difference in valuation, moreover, would have slight effect upon the relative rate levels, first, because the return on property is seldom more than a third of the total costs included in rates, and, second, because the properties in any two places have usually been installed in nearly the same proportions under different cost levels. Normally, the distorting influence would be thus practically nil—and policy should be based upon normal conditions, and not upon extreme possibilities.

But assume that the entire plant in one place had been installed at low costs, and in the other at high costs. Would the distorting influence be great enough to require equalization as to the basis of valuation in the two places?

The facts as to serious distortion should, at least, be clear beyond doubt before the higher burdens of reproduction costs are imposed upon the community which had its properties installed at lower costs. Equalization, however, would not change the fundamental facts; it would merely shift the advantage of low cost construction; pyramid it in favor of a small group of common stockholders, instead of leaving it as a general community benefit.

IF there is any substance to the distortion argument, it must apply not only to utilities but to all public works and services which form a part

of the economic organization of a community.

Suppose one community constructed its highways at low costs, the other at high costs, and both have issued bonds for the cost of construction. In order to equalize conditions and prevent economic distortion, would Professor Brown compel the taxpayers or the highway users in the first community to pay interest upon the reproduction cost notwithstanding the lower amount of bonds actually issued?

Would he consistently follow his doctrine in respect to drainage, irrigation, schools, and all public improvements?

If not, then he must face a double burden of proof why we should apply the theory to only certain groups of public activities. If he proposes consistency, then actual policy is contrary to his views as to all publicly owned utilities—is the policy wrong? Does it not seem clear that as to all public activities, whatever the technical ownership, each community must or should bear the actual costs incurred in terms of dollars? If it happens to build at low costs, it obtains a general community advantage, as compared with other places which have incurred higher costs.

Can anyone seriously propose an equalization of costs upon taxpayers or users, merely to preserve a theoretical equality of conditions between the communities, or argue that relative economic conditions are materially affected by such differences in community experience?

In dealing with railroads, we believe that their economic status is materially different from that of local utilities. For the latter, rates can be fixed in each community according to local conditions, while railroad rates must constitute a continuous network covering wide stretches of territory. Hence, notwithstanding low construction costs on one road and high costs on another, the rates on the two must be essentially the same.

This situation, however, has been adequately met by the special provisions of the 1920 Transportation Act. We believe that, by and large, the system of regulation there provided, especially as developed by the Interstate Commerce Commission, meets properly the railroad situation.

In conclusion, let me restate that my objective is wholly to make the system of regulation readily administrable and financially sound. I do not wish the consumers to get an advantage at the expense of the investors, or the investors to benefit at the expense of the consumers. As a long-run proposition, I believe that the public must pay the full cost of utility as well as other public enterprises. I believe that rate regulation is inevitable under a system of private operation of monopolies vested with special public interest. I believe that regulation must be workable if it is to be continued. It cannot be continued on any other basis.

The failure of regulation does not mean the mere abandonment of public control, but is likely to lead to the substitution of public ownership and operation. If private operation has the advantages claimed for it, the only way to preserve it is to make regulation effective and financially sound.

The Supreme Court and the New York Subway Contracts

Gilchrist *versus* Interborough Rapid Transit Company

By GEORGE H. STOVER
COUNSEL TO THE TRANSIT COMMISSION

No slight stir was created when, on February 1, 1928, the Interborough Rapid Transit Company suddenly and dramatically indicated its intention to ignore the rate provisions of its contracts with the city of New York and to abrogate the 5-cent fare which had been in force for fifteen years. The company professed to have discovered that an inflexible contract rate was not possible under the statutes of the state, and asked the Federal Court to decide that question in its favor while preventing, by injunction, the state courts from deciding it.

Something like astonishment was felt when the United States District Court for the Southern District of New York, by restraining orders and temporary injunctions, prevented the Transit Commission of the state and the city of New York itself from prosecuting any suits in the state courts to prevent a breach of the contracts or to determine the meaning of the statutes, and allowed the company to charge a 7-cent fare. This astonishment was not abated when the opinion of the Statutory Court * was searched for the grounds of the decision. To many, it seemed that the court had rooted up the merestones theretofore fixed on the confines of a limited Federal jurisdiction.

The Supreme Court of the United States (May, 1928) stayed the order of the District Court pending the appeal, which was twice argued before it—once in October, 1928, and again in January, 1929; and on April 8, 1929 [P.U.R.1929B, 434], in an opinion by Mr. Justice McReynolds, found that "the challenged order was improvident and beyond the proper discretion of the Court" and, accordingly reversed it.

It was unnecessary for the Supreme Court to pass upon all the many questions which were argued or to invoke any, except well-settled legal principles. The Court was conservative in its approach to the question; it made no new law; and may be said merely to have regilded the refined gold of ancient principles for

* Interborough Rapid Transit Co. *v.* Gilchrist, 26 F. (2d) 912, P.U.R.1928D, 92.

the benefit of those to whom these principles might have become very dim.

THE Interborough Rapid Transit Company operates both elevated and subway railroads within the city of New York. The former are, for the most part, owned by the Manhattan Railway Company under grants running back to 1875 and ending in a grant of third-trackage rights in 1913; and were leased in 1903 to the Interborough for a term of 999 years. Some extensions to these lines, also under grants in 1913, are owned by the Interborough itself with a reversion to the city. The subways are all owned by the city; were constructed at different times at municipal expense; and were leased by the city under three instruments * made, respectively, in 1900, 1902, and 1913.

The year 1913 was marked by important grants and agreements, which represented the culmination of years of negotiation looking toward the extension and improvement of rapid transit facilities and which form the basis of the rights of the city of New York and of the Interborough Company. They consisted of "Contract No. 3," the "Third Track Certificate," the "Extension Certificate," and a "Supplementary Agreement," and were all executed on March 19, 1913, under authority of the Rapid Transit Act.** In 1912, the legislature of the state of New York, with full knowledge of these contracts and certificates, which had then been tentatively agreed upon, amended the Rapid Transit Act so as definitely to authorize such contracts and certificates; † and the Court of Appeals had sustained the validity of the legislation and of the proposed agreements.§

These contracts and certificates provided for extensions and improvements to the then existing rapid transit lines, both subway and elevated, and fixed the terms, including the rate of fare, upon which the Interborough was to operate.

BY Contract No. 3, some fifty miles of subway were to be added to about twenty-four miles of existing city-owned subways already operated by the Interborough under Contracts Nos. 1 and 2. These existing contracts of lease were modified and extended. The city agreed to construct the new subways and to lease them to the Interborough, which agreed to operate them in conjunction with the existing subways for a single fare. Contract No. 3 expressly provided ¶ that the Interborough should be entitled to charge for a single fare "the sum of 5 cents but not more."

The "Third Track Certificate" granted to the Metropolitan Railway Company the right to lay certain additional third tracks. As the entire Manhattan elevated system was to be operated by the Interborough, according to provisions of the "Extension Certificate," no provision as to the rate of fare was contained in the "Third Track Certificate."

The "Extension Certificate" granted to the Interborough the right to construct and operate certain exten-

* Contracts Nos. 1, 2, and 3.

** Chapter 4 of the Laws of New York for 1891 as amended.

† Laws of 1912, Chapter 226.

§ Admiral Realty Co. *v.* New York, 206 N. Y. 110, 99 N. E. 241.

¶ Article LXII.

sions to the elevated tracks. It provided that the Interborough should be entitled to charge for a single fare for each passenger for one continuous trip over the elevated system "the sum of 5 cents but not more."

These certificates were issued, under authority of the Rapid Transit Act, by the Public Service Commission for the First District (predecessor of the Transit Commission) for and on behalf of the city of New York. The Rapid Transit Act provides * that such certificates should be delivered upon receipt by the Commission of a written acceptance of its terms, conditions, and requirements and that when delivered and accepted it should be deemed to be a contract between the city and the grantee and should be enforceable by the Commission, acting in the name of the city, according to the terms thereof.

By the "Supplementary Agreement" the city granted to the Interborough trackage rights from the elevated lines over certain parts of the subways of the city.

The Interborough Company, as required by statute † filed tariff schedules which showed a 5-cent fare on both the subway and the elevated lines; and this rate of fare continued unchanged for a period of fifteen years.

IN 1920, the Interborough made application to the Transit Commission for an increase in fare on its elevated lines. This was denied by the Commission for want of jurisdiction, on the theory that the Public Service Commission Law had delegated to the Commission no power to increase a rate fixed by contract entered into under the Rapid Transit Act. The Interborough took steps to review this determination so as to bring the question before the state courts, but later discontinued its proceeding and so acquiesced in the Commission's view of the law.

In 1922, the Interborough again applied to the Transit Commission for an increase in fare—this time on both the subway and elevated lines. This application was also denied for want of jurisdiction; but the Interborough took no steps whatever to bring the question before the state courts.

These applications were both made under Section 49 of the Public Service Commission Law, which empowers the Commission generally to determine and fix just and reasonable rates of fare. At that time the Interborough apparently recognized that a contract rate of fare could be altered, if at all, only by affirmative action of the Commission.

THE company apparently had concluded that, under the law as it then stood, no means were available, by which it could free itself from the rate limitations of its contracts, since in 1925 it memoralized unsuccessfully the legislature to confer such power; but suddenly, on February 1, 1928, it filed with the Transit Commission amended sheets to its tariff schedules which showed that on and after March 3, 1928, it intended to charge a rate of 7, instead of 5, cents on both its subway and its elevated division.

Section 29 of the Public Service

* Section 24.

† Public Service Commission Law, section 28.

Commission Law provides that, unless the Commission otherwise orders, no change shall be made in any rate, fare, or charge which shall have been filed, except after thirty days' notice to the Commission and publication, but that the Commission, for good cause shown, may allow changes on less than thirty days' notice. An application filed with the schedules asked the Commission to make an order permitting the schedules to go into effect on not more than five days' notice; but no application was made, asking the Commission to increase the rates. From this, it may be inferred that the company supposed that, although the legislature had not delegated to the Commission, under Section 49, the power to increase a contract rate, it had delegated that power to the company itself, under Section 29.

THE Transit Commission is a state body which acts in a dual capacity. It is a regulatory body; and it is also a special representative of the city for making and enforcing rapid transit contracts. The threat of an increased fare called upon it to act in both capacities. As a regulatory body, it proposed to bring a summary proceeding, as authorized by statute, to test the validity of the new schedules and, as representative of the city, a suit in equity to prevent a breach, and secure specific performance, of the city's contracts.

When the company became aware of this and while the matter was still pending before the Commission, a suit was filed by the company at 9:20 A. M. on February 14, 1928 in the United States District Court for the Southern District of New York to secure a permanent injunction restraining the Commission and the city from interfering with the company's right to charge a 7-cent fare.

A few hours after this the Commission took action rejecting the tariff schedules as unlawful and directing its counsel to institute actions in the state courts. This was done; and at the same time an equity suit, similar to that brought on behalf of the city by the Commission, was brought by the Corporation Counsel of the city, as its general legal representative.

THE District Court, in an ancillary action, thereafter enjoined the Commission and the city from proceeding with these state suits;* and on May 10, 1928 the Statutory Court of three judges granted a temporary injunction restraining the Commission and the city from interfering with the right of the company to charge a 7-cent fare.†

The District Court found that the 5-cent rates were confiscatory. It was conceded that these rates were contract rates and it was apparently recognized that an inflexible contract rate cannot be "confiscatory." It was held, however, that these particular contract rates were not inflexible, since the Commission had power to change them. It was held that the Public Service Commission Law enacted in 1907, which conferred a general power on the Commission to increase rates, included also the power to increase contract rates expressly authorized by the Rapid Transit Act.

* Interborough Rapid Transit Co. *v.* Gilchrist, 25 F. (2d) 164, P.U.R.1928C, 428.

† Interborough Rapid Transit Co. *v.* Gilchrist, 26 F. (2d) 912, P.U.R.1928D, 92.

The District Court was of the opinion that the state court of appeals had so held.

In finding that the order of the District Court was improvident and beyond its proper discretion, the Supreme Court said that in order to support the action of the court below it would first be necessary to show with fair certainty that before the original bill was filed the Commission had taken, or was about to take, some improper action with respect to the Interborough Company's new schedules, and that this did not appear from the record. It pointed out that the Transit Commission had, long prior to the original bill, held the view that it lacked power to change the 5-cent rate or jurisdiction to permit a new rate, because the existing one was irrevocably fixed by lawful contracts, and that it had intended to test this point of law, which called for construction of complicated state legislation and had never been authoritatively determined, by an immediate orderly appeal to the state courts. This purpose, the Supreme Court said, should not be thwarted by an injunction.

THE Supreme Court further said that to support the action of the court below it would be necessary to show also that the 5-cent fare was so low as to be confiscatory, and that this did not appear from the record. The District Court had based its action upon supposed values and requirements of all lines operated by the Interborough, treated as a unit; but the Supreme Court held that the elevated and subway lines, although operated by the same company, must be treated as separate for rate-making purposes. It also said that the claim for an 8-per cent return upon the values of subways, which are the property of the city and declared by statute to be public highways, was unprecedented and ought not to be accepted without more cogent proof, and that considering the probable fair value of the subways and the current receipts therefrom no adequate basis was shown that the 5-cent rate was confiscatory as to them.

THE widespread interest aroused by the novelty, magnitude, and complexity of the case fostered an impression that great constitutional principles were in the balance. In a sense, they were; for had the decision of the District Court been sustained the result would have been revolutionary. To hold that a Federal Court may increase a contract rate merely because the state may do so, is bad enough; but to hold that it may do so merely upon a bare *claim* that the state may do so, is infinitely worse. Such a situation would undoubtedly give an added impetus to the movement for municipal operation.

THE Supreme Court decision lops off the 2-cent increase in fare, which would have increased the receipts of the Interborough by about $23,000,000 annually, but, what is more important, it tends to preserve the line of demarkation between state and Federal power and may serve to moderate the zeal of such of the lower courts as sometimes appear to believe that one of their most important functions is to expound and expand the 14th Amendment.

The Waiver of Constitutional Rights by a Public Utility

A legal problem that has a far-reaching effect in determining a company's right to a "fair return"

By FRANCIS X. WELCH

THERE is one aspect of constitutional law as applied to public utilities that should have special appeal not only to attorneys but everyone who is really interested in public service company regulation. That is the waiver of constitutional rights by public utility companies.

The determination of this question in all its particular ramifications will have a lasting effect not only upon the immediate fortunes of the corporations involved but also upon the general regulatory policy of the state, the consumers, and private commerce generally. Few if any legal problems are so vast in their significance.

The Federal Constitution, as drafted by our forefathers before the days when incorporating became almost necessary to the success of any commercial enterprise, gave to all men or "citizens" certain rights—such as the freedom of speech, of the press, and of religious belief, protection from unlawful search and seizure and the right to a trial by jury.

Then corporations became so numerous that the courts began to give to them some of these rights and disallow others. Thus, while a corporation is a "citizen" within the meaning of the term that allows it to sue in the Federal Courts, it is not even a "person" within the meaning of the clause protecting all persons from compulsory self-incrimination.

When succeeding years added amendments to the original constitution, certain rights were allotted to public service companies by virtue of judicial interpretation. Therefore, it is fairly well-settled that a utility is protected from state regulation so oppressive as to result in denying to the company a fair return on its property.

So it is said that "a utility has a right to a fair return."

CAN this right be waived? If one is to reason by analogy, the answer would, in all probability, be "yes."

A person may waive his constitutional right to a trial by jury. He may waive the protection which the Constitution gives him against compulsory self-incrimination. He may waive personal service, extradition, and other privileges which the law gives to him. There is some question whether he might not even waive indictment.

Is it the same with a public service corporation?

Some time ago the Tennessee Commission conceived the idea that all future arguments over the valuation of hydroelectric plants might be avoided if the Commission imposed as "conditions" to the certificate of convenience and necessity of such companies, whatever restrictions it might think proper for future rate making. These companies could not operate lawfully in the state of Tennessee without these certificates and if they accepted them, they would, of course, have to accept the conditions upon which they were issued.

It sounds legally plausible, but the chancery court of Tennessee, later sustained by the supreme court of that state, held that the Commission had no right to require a citizen to bargain away his constitutional guaranties even under the guise of a condition precedent to the issuance of a certificate to engage in utility business.*

The Supreme Court of the United States has said on this point:†

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all."

* Tennessee Eastern Electric Co. *v.* Hannah, P.U.R.1928D, 50.

† Frost *v.* California Railroad Commission, P.U.R.1926D, 483.

THERE has been some talk in Massachusetts about making all new utilities "contract" with the state through the medium of the Department of Public Utilities. The terms of the contract would be the surrender by the utilities of any future claim to a rate based on the reproduction cost theory of valuation in consideration for the right to do business.

Whether putting the waiver on a contract basis would make out a stronger case has never been squarely settled, but there are certainly very severe doubts about it in the minds of jurists versed in this branch of the law. In the very recent Worcester Electric Light Case (P.U.R.1929B, 1), the Special Master for the Federal District Court found that the Massachusetts Department in that proceeding did not have any authority to enter such a contract with the utility, but stated further that he did not believe the utility could contract away its constitutional right to a fair return even if the Department did have such authority.

Suppose, however, that the company *wants* to give up its rights to a fair return. Suppose a utility wants to engage in a rate war. Is the case any different?

The Montana Commission after a scholarly review of practically all available authority on the subject is of the opinion that the answer is still "No."

It seems there are two natural gas companies operating in Shelby. Recently one of these companies decided that the best way to clear the situation would be a rate-war with a fight to the finish. The company asked permission to draw first blood by a

slashing reduction of rates, apparently not covering even operating expenses. It was the utility's contention that it had a lawful right to engage in a rate-war in order to protect ultimately its right to a fair return, since a fair return would never be available while its competitor remained in the field. The manager stated:

> "Rate regulation is just and equitable under ordinary conditions but a competitive situation has arisen at Shelby which forces the Great Northern Utilities Company to protect its investment in the most thorough manner possible and we are willing, if required, to forego for the present the net earnings to enjoy the greatest ultimate benefit."

THE Commission, in an opinion that clearly discusses the economic failure of competition as a regulatory factor for public utilities, states:

> "Further, the record supports the finding that the preferred rates will not even yield enough revenues to defray normal operating expenses, including a fair allowance for depreciation, under existing conditions at Shelby, nor would they provide sufficient income to cover normal operating costs if conditions were the same now as they were during the calendar year 1927 when the utility sold more natural gas than it had during any year since its entry into the utility field. Assuming that the utility has the right to waive its right to a fair return, or any part of it, it is apparent to us that it cannot waive its rights to such an extent as to imperil or impair its ability to render dependable, adequate service to the public it serves. It is a primary duty of a public utility to properly maintain its plant and equipment to the end that it can render adequate service to the residents of the territory it professes to serve. Quality of service and freedom from interruptions in service are just as important to consumers as are reasonable rates. In this modern day communities have become so dependent upon services furnished by public utilities for the successful prosecution of industries and for use in the home that any impairment in efficiency or continuity of service would not only result in serious inconvenience but in many cases downright hardship. The utility must look to its rates to provide its operating expenses. If they are insufficient, curtailment or entrenchment generally ensues; competent personnel is often replaced by mediocre and less expensive employees; ordinary repairs are neglected; inferior materials are used in making absolutely necessary repairs and retirement of units, worn in the service, postponed, all tending to affect the quality of the service and to render probable serious interruptions in the service. So it is perfectly plain to us that any rate schedule that would tend to produce such results is detrimental to the public interests and, therefore, unjust and unreasonable." *

IT would seem then that a corporation, especially a utility, has not the same privilege of repudiating its constitutional rights that a private citizen has. This principle is probably based on a consideration of the fact that such rights are not solely for the protection of the manager, directors, or even those financially interested. They are the safeguards which the law throws about the important business of public service for the benefit of the public at large.

* Public Service Commission *v.* Great Northern Utilities Co. (Mont.) Dockets Nos. 991 and 1028, Report and Order No. 1530.

The "Demand Factor" in Rate Making

By DAVID LAY

GEORGE was showing Bill through his house. When Bill looked at George's gas meter he registered interest.

"Why," said Bill, "your meter is twice as big as mine, and my house is a good deal larger than yours. How do you happen to have a meter that size? Are you heating your house by gas?"

"No," replied George, "we use it just for heating our water and for cooking."

"Well," said Bill, "that is what I use gas for. I probably use as much as you do and it may be more. Why is it that your meter is so large and mine so small?"

George and Bill could not understand the reason for this difference in the size of the two meters. Their curiosity was aroused; so they asked the company for an explanation.

"Is this some new system of metering you are putting in?" they asked of the manager of the company. "Is the big meter a better meter? Will it make any difference in the bills?"

THE manager explained the mystery to George and Bill as he had done many times before to others.

It seems that George heated his water by what is known as the "instantaneous method." He did not have to wait for hot water. It was ready when he turned on the tap; but it took an enormous flow of gas to heat that water instantaneously, as the water passed through the pipes.

Bill got hot water when he wanted it, but he heated his water by the "storage tank method." A much smaller flame burning over a longer period heated the water which was stored in the tank and in this way kept ready for use.

George might use the same amount of gas in five minutes that Bill used in twenty minutes for heating the same amount of water. George's short-time demand for gas was more than a small meter could take care of. George's big meter would not be working as long as Bill's small meter but it had to be big in order to measure the larger amount of gas required for the instantaneous heater.

It was the difference in their demands upon the company that accounted for the size of their meters.

This illustrates one of the important features of scientific rate making. It is what is known as the demand feature or factor—very mysterious to the average customer but very simple in principle.

ASSUMING that George and Bill use exactly the same amount of gas a month for heating water for household purposes, it is apparent that it

costs the company a little more to serve George than it does to serve Bill, because the company has to buy a bigger meter for George than it does for Bill. Its mains and plant also have to be a little larger. This means a greater investment. If we multiply George's demand on the company for a larger meter, larger mains, and a larger plant by a thousand or ten thousand of such demands it will be seen that additional cost of meeting this demand will run into money.

That is why the demand factor has to be considered in scientific rate schedules.

The electric companies discovered this long ago. The gas men, however, did not wake up to the difference in costs due to varying demands of different consumers on the system as soon as they should, but they are now trying to establish scientific schedules which take this factor into account. Considerable opposition is made to the changes in gas rates, necessary to cover the demand, however, because the public does not yet understand the nature of this change.

The customer's demand is a factor which cannot be neglected in accurate rate making.

PERHAPS you have noticed a series of water pipes running close to the ceilings of factories, manufacturing plants, or even office buildings. If a fire starts in the room, it melts a soft metal plug in the pipes running along the ceiling permitting water to flow upon the flames so as to put them out or check them until the fire department arrives to finish the job of extinguishing the blaze. Suppose there were a thousand buildings equipped in the same way. That would mean larger mains, more capacity for the water works, all of which would add to the cost of being ready to render service. It is not probable that there will be a thousand fires at once, but the plant must be large enough to take care of any reasonable demand that might be made upon it for fire protection. This demand is continuous, twenty-four hours a day, three hundred and sixty-five days in a year. The use of the water comes at rare intervals. A charge merely for the amount of water used would not cover the cost of standing ready at all times to meet the demand. So in a water rate schedule the demand feature may be very important. That is why high "hydrant charges" are sometimes made.

SUPPOSE a manufacturing plant generates its own electricity (as many of them do), but to avoid possible interruption due to a breakdown of its generators, the manufacturer connects a wire with an electric company's transmission line for use when the manufacturing company's equipment is out of commission. This service may never be used, but the electric company must be ready to supply it when called for. Its plant must be large enough to take care of the demand and it is only fair that the cost of meeting that demand should be paid by the customer.

So, whether the customer of a utility company calls for service or not after his connection with the plant is made, the demand charge should be paid—because the service is ready for him at all times.

WHAT READERS ASK

Out of the mail bag of the Editor have come these questions; because they touch upon subjects of broad interest to those in the public utilities field, they have been selected for publication—together with the answers. What questions do *you* want to ask?

Question

Why should a State guarantee a fair return to a utility company any more than to other business enterprises?

Answer

The state does not guarantee a fair return to a utility company. A good many persons think that when a State Commission holds that a utility company is entitled to a 7 or 8 per cent return and fixes a rate to produce that return, that this is a guaranty. The return, however, is not guaranteed. The Commission merely says to the company: "You are entitled to earn such a return if you can." The Commission cannot compel persons to take the service. The companies have to render service if it is demanded, but the public cannot be forced to take it. A street car fare of 6, 8, or 10 cents may be declared reasonable by the Commission but the people do not have to ride in street cars. Therefore, a Commission when it decides that a utility company is entitled to a certain return does not guarantee that the company shall receive it.

Question

How can a prospective investor obtain information concerning the real value behind public utility securities?

Answer

The best way probably, is to ask his banker. If the banker does not happen to have the specific information, he can probably tell where it can be secured. Investment bankers have this information compiled for the benefit of those who want to purchase securities. In the case of utility operating companies and holding companies, this information relates, among other things, to the character of the security (whether it is a mortgage, note or stock), the property covered, prior liens, the value of the equity, the restrictions, the sinking fund, and the depreciation reserve provisions and requirements.

In the case of operating companies the information includes the description of the property, its location, the characteristics of the territory and the population it serves; the service furnished (including proportions between the kinds of service); franchises, including public relations, the regulation of rates, and other details; a description of the management; a description of the property, its capacity, its output, its engineering features, the value of the property and the basis of valuation; a balance sheet with a statement of capitalization; the earnings, including the operating ratio and the depreciation ratio; the percentage of gross earnings for maintenance, and the amount of Federal taxes and depreciation.

In the case of holding companies, the information includes the name of the company through which its securities are held; the portion of the total securities held; description of the management (whether operating or otherwise), a consolidated balance sheet or statement of capitalization showing prior securities outstanding, including those of subsidiaries; its earnings, including consolidation proceedings, showing earning applicable to holding company securities, its income and its dividend record; its estimated Federal taxes and depreciation, and the actual figures or percentage of gross earnings for maintenance.

Question

Is a public utility rate fixed by a State Commission a tax on the public?

ANSWER

No. A rate fixed by a Commission is sometimes referred to by the newspapers who are hostile to public utilities, as a "tax," but this is a use of the word tax in a very loose sense. A tax is a financial obligation imposed by a government upon its citizens for the support of the government, and the obligation is compulsory. A rate fixed either by a utility company itself, or by a Commission on behalf of the state fulfills neither of these requirements. The rate is for the support of the company and the obligation is not compulsory. A utility rate, however fixed, is no more a tax than the price of a bushel of potatoes fixed by the corner grocer, is a tax.

QUESTION

What is the outlook for public utility securities? Most of the securities of public utility companies in the last year have enjoyed a substantial appreciation. Will this continue?

ANSWER

The appreciation in value of public utility shares reflects the consistent progress in the industry and the confidence of the public in its future. Electric power and light consumption last year gained about 10 per cent over 1927, while the net of companies in this group was about 15 per cent higher. Gas companies experienced a similar gain, while telephone net was about 5 per cent more and the traction lines about held their own despite higher operating costs. The increasing number of uses of electricity and gas are taxing these services more than ever. Undoubtedly, the present level of prices of the shares of the more prominent companies discount to some extent their future growth. Still, the immediate prospect appears favorable.

An important factor in the growth of the power companies will be the electrification of some of the larger railroads. Then, too, the tendency toward the consolidation of companies into larger holding groups will react favorably to the shares of individual companies. These consolidations should result in savings beneficial both to consumer and stockholder. Every thing considered, the immediate outlook appears promising, with every indication that it will continue for some time to come.

QUESTION

What is meant by the "attraction of capital?"

ANSWER

Attraction of capital is the inducement which leads it to go this way or that. Capital will be attracted towards those enterprises which promise the greatest return consistent with safety. Money can be secured for safe investment at a lower rate of interest than for speculative ventures. The investment, whatever it is, must be attractive to the investor or the money will not be forthcoming. Conversely, the borrower will not be attracted if the rate for capital is too high. We have seen a very good illustration of the laws of attraction of capital and of borrowers, in the use of money for speculative purposes in New York Stock Exchange transactions and the effect of interest rates on the flow of capital into brokers' offices.

As far as capital for public utilities is concerned, the rate of return must be sufficient to attract it; otherwise it cannot be had.

QUESTION

Has the question of the power of a State Commission to disallow a charge of a holding company to an operating company for service ever been passed upon by the Supreme Court of the United States?

ANSWER

Yes. In the Southwestern Bell Telephone Company case, P.U.R.1923C, 193, this question was specifically passed upon. A State Commission had reduced the 4½ per cent gross revenue charge made by the American Telephone & Telegraph Company for rent and services. The Supreme Court held that this action by the Commission was erroneous where there was nothing to indicate bad faith or the improper exercise of the discretion of the management of the company in fixing the charge. The reason given for the decision was that the state, in the regulation of public utilities, is not clothed with general power of management incident to ownership.

QUESTION

Is the policy, resorted to by many public utility companies, of paying dividends in whole or in part in stock, of benefit to the stockholders?

ANSWER

The practice of paying dividends in whole or in part in stock reacts favorably not only to the stockholder but also to the corporation as well. Many companies desire to retain as large a proportion of surplus income in the business as possible to help defray the costs of expansion. In line with this policy, some companies offer the alternative of a cash or stock dividend, and, inasmuch as the latter generally amounts to more than the cash equivalent, the bulk of the disbursements are made in the form of stock, thus permitting a conservation of cash. As a result, requirements in connection with new capital financing are reduced to a minimum, and the stockholder benefits because of the reduction in new financing and, consequently, the enhancement of his equity as well as the liberal return on his investment through the sale or accumulation of stock dividends.

QUESTION

Utility companies often have optional schedules giving their customers a choice of rates. These are not always clearly understood by consumers. Have the Commissions established any rules as to the duty of utility companies to notify ratepayers when they are entitled to a more favorable schedule than the one under which they are being served, and any rules requiring refunds to the consumer in the absence of notification?

ANSWER

How consumers shall be treated under such circumstances has not been very generally considered by the Commissions, although the following principles have been established in some states:

No obligation rests upon the utility to assure itself that at all times consumers are on the most favorable schedule.

The choice of schedules lies with the consumer although the utility should give all necessary advice.

In determining which schedule shall be adopted, the consumer is presumed to be a better judge of the future conditions of his business than the utility.

While a utility company should endeavor to place its customers on the schedule most favorable to the customer, it is not liable if it may eventually be proved that the schedule adopted in good faith actually resulted in higher charges than another available schedule.

An electric utility has no duty to advise and see that a customer is taking service under the most advantageous schedule, although the customer complains that his bills are excessive, and there is, therefore, no basis for reparation for payment for current under a less advantageous schedule.

If the company notifies a consumer of a more favorable schedule, and the latter fails to take advantage of it promptly, he cannot claim reparation.

An early Missouri case seems to place the duty of determining the most favorable schedule on the company.

It has been suggested by the California Commission that unfriendly public relations often result from a misunderstanding of schedules, rules, and practices of utility companies, and that every effort possible should be made by the companies to see that their employees are properly instructed to explain them. The following cases deal with these questions:

Maison *v.* Commonwealth Edison Co. (Ill.) P.U.R. 1927C, 1; Shure Co. *v.* Commonwealth Edison Co. (Ill.) P.U.R.1926E, 235; Hoosier Stove Co. *v.* Indiana General Service Co. (Ind.) P.U.R.1927B, 135; Munn *v.* Commonwealth Edison Co. (Ill.) P.U.R. 1922E, 472; Rhodes-Burford Home Furnishing Co. *v.* Union Electric Light & P. Co. (Mo.) P.U.R. 1916B, 645; *Re* San Joaquin Light & Power Corporation (Cal.) P.U.R.1922D, 595.

QUESTION

Can the engineer in general charge of the appraisal of utility property testify as to its value in the absence of the evidence of his subordinates by whom the property was examined and who alone have first-hand knowledge of its nature, extent and condition?

ANSWER

This kind of testimony is introduced continually in public service cases, and engineers state their conclusions based largely upon information received by them from other persons who are not witnesses in the case. This is usually done without objection, but of course the strict rules applicable to law courts do not prevail in Commission investigations.

Nevertheless it was held in a case before the West Virginia Commission, in *Re* Cumberland & Allegheny Gas Co., P.U.R.1928B, 20, that the accepted rules of evidence cannot be entirely disregarded by presenting an estimate of reproduction cost based upon expert

opinion testimony unsupported by available testimony of persons acquainted with the property inventoried, although even in this case the Commission said that the correctness of the inventory might be assumed for the purpose of analyzing the property included in the reproduction cost exhibit.

In a case decided by the Oklahoma Supreme Court, Muskogee Gas & Elec. Co. *v.* State, P.U.R.1920C, 806, it was held that the rule against the admissibility of hearsay testimony does not apply to exhibits made from the books of a public service corporation where the company is confronted with the exhibit and given an opportunity of cross examination and rebuttal, since the witness is not giving the condition of the books as such but merely stating what he has found out and knows from his own knowledge.

There are, of course, limits beyond which parties in Commission proceedings can not go in introducing this type of evidence. The New Jersey Board, for example, in *Re* Public Service Railway Co., P.U.R.1918E, 910, has held that it is not warranted in giving any consideration to an appraisal by a party who was not produced as a witness for examination or cross examination on his report.

Question

How many operating electric light and power enterprises are there in the United States?

Answer

According to the report of the bureau of census on December 31, 1927, the total number of enterprises was 4,327 which is made up of 2,192 municipal plants and 2,135 commercial plants. These are divided by states as follows:

	Commercial	Municipal
Alabama and Georgia	46	111
Arizona	29	8
Arkansas	28	13
California	52	23
Colorado	36	36
Connecticut	31	6
Delaware, Maryland and District of Columbia	29	18
Florida	22	37
Idaho	37	14
Illinois	76	76
Indiana	73	84
Iowa	69	150
Kansas	30	216
Kentucky	33	8
Louisiana	17	34
Maine	62	8
Maryland	Included with Delaware	
Massachusetts	77	46
Michigan	66	69
Minnesota	55	135
Mississippi	22	33
Missouri	69	53
Montana	24	2
Nebraska	56	242
Nevada	14	4
New Hampshire	34	8
New Jersey	13	16
New Mexico	18	2
New York	124	53
North Carolina	40	85
North Dakota	48	31
Ohio	93	114
Oklahoma	37	74
Oregon	26	11
Pennsylvania	158	40
Rhode Island	6	1
South Carolina	23	35
Tennessee	37	18
Texas	66	33
Utah	17	29
Vermont	48	14
Virginia	35	17
Washington	52	15
West Virginia	48	6
Wisconsin	97	87
Wyoming	28	14

Question

If street railways are required to pave the streets between their tracks, is not the money expended a capital expenditure upon which they are allowed to earn a return the same as on the rest of their property? If so, what reason have they to complain?

Answer

Yes, the amount expended in pavements is a capital expenditure. Yes, the companies are allowed the same return on this that they are on the rest of their property.

The companies claim they have the right to complain, in the first place because the paving required is an unjust tax upon the car riders, for the reason that the pavement is not essential to street car service and for the further reason that the street car riders are required to pay more than their share of maintenance, while the owner of automobiles and trucks which tend to wear the pavement more, are not taxed directly, as are street railway riders, either for construction or maintenance.

The street railways object to the paving expense in the second place—and this is probably their chief reason—because it tends to increase street car fares which in turn tend to reduce the number of passengers carried.

Are Holding Companies Classified as "Public Utilities?"

If So, Are They Subject to Regulation?

By RICHARD LORD

A LARGE number of persons who are interested in the regulation of public utilities, view the activities of holding companies with some alarm. They think holding companies can and ought to be regulated, to the full extent that operating companies are regulated.

Holding companies do two things which are of interest to the public; they issue securities of their own which they sell to the public, and some of them, at least, furnish service to the operating companies. For this service they make a charge.

Those who buy the stocks of the operating companies are interested in the amount of capitalization, the value behind the stocks and bonds, and in the earning power of the operating companies. The ratepayers of an operating company may be indirectly interested in the capitalization of the holding company which does the financing, as this may have a bearing on the quality of the service.

The capitalization of the holding companies has no direct bearing on the rates of the operating companies, in the states where the rates of the operating companies are regulated by State Commissions; the rates of the operating companies, depend upon the value of the property of the operating companies, and not upon the capitalization of either the operating or holding companies. If the security issues of the holding companies are regulated, the purpose will be chiefly to protect stockholders and not the ratepayers.

If the charges which the holding companies make to the operating companies for supplies and services can be regulated, the regulation would have a direct bearing upon the rates of the operating companies, because these charges constitute part of the expenses of the operating companies. The effect of the regulation of such charges, even if comparatively high, would have a very slight effect on rates, however, as they do not constitute a very large part of the total expense of operation.

It is likely that the importance of the regulation of holding companies to ratepayers is being greatly exaggerated. That, however, is no reason why they should not be regulated, even if the benefits of regulation were slight as compared with its cost. But the interesting question with reference to the control of holding companies is whether they can be regulated to this extent.

Nobody can doubt that the security issues of holding companies can be regulated, just as the security issues of any sort of a corporation can be regulated.

But how about the charges the holding companies make to the operating companies? These cannot be directly regulated, as are the charges of operation, unless the holding companies are public utilities.

Suppose ten operating companies in a single state were owned by John D. Rockefeller as an individual. Would Mr. Rockefeller be a public utility? Does mere ownership of stock of a public utility by an individual or corporation make the owner a public utility?

Does the furnishing of managerial service by a holding company to a utility company make the person or corporation furnishing it a public utility? One of the important elements of public utility service, is that the service must be held out to the public in general. A railroad, for example, built to carry only the freight of its owners would not be a common carrier subject to regulation. The holding companies do not hold themselves out to supply their services to all comers. If they are public utilities, and their charges can be regulated, then any operating company which asks for such services can have them on the same basis.

It is very doubtful indeed whether holding companies can be regulated on the theory that they are public utilities, no matter how desirable such regulation might be. If this is so, the further question whether they are engaged in interstate commerce is not of much consequence. It is a very interesting legal situation.

Courage, vision, daring have characterized the electric power and light industry. Projects dwarfing the building of the Panama Canal have become almost commonplace. The cost of producing power has been repeatedly reduced, current has been transmitted in volume and over distances not attempted elsewhere. Skilled salesmanship has been employed and the goodwill of consumers, customer-owners of securities and the general public has been assiduously cultivated. Not many industries have prospered more.

—B. C. FORBES.

What Others Think

Regulating the National Transportation System

THE coming battle over the consolidation of the American railroads is bound once more to raise the problem as to just how far the Federal government can go in regulating interstate carriers. Many issues will be discussed in this connection during the coming sessions of the seventy-first Congress and many questions will arise which will ultimately have to be decided by the courts. Thus far the spoils have gone in most part to the Federal government and the authority of the several states has been steadily narrowed. Decisions of the United States Supreme Court and acts of Congress have created an ever-increasing centralization of power in the hands of Federal authorities and each decade has seen fewer functions left for the states to administer. During the past decade the movement toward Federal control has taken great strides, so great in fact, that there has developed "a widespread belief, particularly among state officials charged with the duty of regulating railroads, that this process has gone too far and, if unchecked, will result in a dangerous centralization."

To portray how this concentration of power in Federal hands has come about, to take stock of the situation at the moment and to present proposals for change is the task which Mr. George G. Reynolds has set for himself in a recent volume on "The Distribution of Power to Regulate Interstate Carriers Between the Nation and the States." By analyzing the decisions of the courts as they bear on interstate transportation and discussing the various acts of Congress from the days of the adoption of the Constitution to the present, he has ably presented a picture of the steps by which we have gotten to the stage of almost complete Federal control of our interstate carriers. In this sense the volume is of an historical nature, and the largest portion of the argument is given to a survey of the manner of drawing a line of separation between Federal and state action.

Whereas in former days most of the legislation affecting railroad carriers emanated from the states, any such action must today run the gauntlet of many tests to establish its validity. Mr. Reynolds posits these tests in the form of the following questions which must be answered before a state law or order can become valid.

Does it conflict with the express provision of valid Federal laws or orders?

Does it conflict with an implied intention of Congress to assume exclusive control of the subject to which it relates?

Does it regulate interstate commerce?

Does it regulate a subject which requires a single uniform rule or plan of regulation?

Does it burden interstate commerce?

As a result of the need for meeting these tests, the amount of state control prevailing today is relatively limited. To be sure, the powers exercised by the states appear to be substantial, but when compared with what they were in the past or with the powers of the Federal government they turn out to be rather circumscribed. Indeed, they can be narrowed down to (1) giving relief to shippers who believe that the rates charged for intrastate shipments give undue preference to local competitors, when such relief does not result in changing the general level of interstate rates or cause discrimination against interstate shippers;

(2) passing laws or issuing orders prescribing the frequency and character of intrastate passenger service, provided that interstate traffic is not thereby unreasonably interfered with; (3) regulating the use of equipment and tracks when such actions do not conflict with orders of the Interstate Commerce Commission; (4) authorizing or requiring the construction or continued operation of spur, switching, and side tracks; and (5) ordering the construction of minor station facilities required for intrastate commerce.

Certain types of safety regulations, such as grade crossing construction or elimination, building and fire codes and full crew laws, may also be prescribed by the states. They exercise a considerable degree of control, also, in the field of taxation.

THE author finds certain economic advantages in the present system of interstate carrier control. The concentration of a large measure of power in the hands of the Federal government leads, in his opinion, to certain economic gains. "Foremost among these is the increased financial stability which proceeds from unification of regulation." A uniform plan of regulation protects those lines which operate in more than one state against fluctuations in earning capacity and credit which might result from conflicting state policies in matters of rate of return, property valuation, and requirements for improving and extending service. A second advantage is the protection of interstate traffic from discriminatory state action thus freeing merchandise in interstate commerce from multiple regulation of the terms and conditions under which transportation is rendered.

OPPOSED to these benefits are certain disadvantages which arise from unified control. First and most important is "the overwhelming burden of responsibility which is now placed on the Interstate Commerce Commission" thereby tending "to impair the efficiency of regulation." The multifarious duties imposed upon the Commission have made it "physically impossible for the Commissioners to give prompt and careful personal attention to the innumerable problems which require decisions by them." They are unable to acquaint themselves thoroughly with the facts of the cases they must decide and they must depend in large part upon the findings of examiners who prepare the tentative reports which become the basis of the Commissioners' decisions. Moreover, interminable delay accompanies the determination of cases. Over a year must pass on the average before a decision is rendered on a given complaint.

Centralization of power leads, also, to the deciding of questions which are primarily of local concern by authorities who are not fully familiar with local needs and conditions. Frequently, too, regulation, when so greatly concentrated, does not keep pace with the needs of a given situation. Thus, for example, interstate motor traffic remains unregulated because of the failure of Congress to act in the matter. Since no individual state may act there results an absence of regulatory policy.

To remedy the defects of the present system of centralized control it is suggested that regional Federal agencies be created to relieve the Interstate Commerce Commission of many of its burdens. Such bodies would in addition have the requisite knowledge of local conditions to enable them more effectively to handle local matters. This latter end could be attained, also, by the appointment of State Commissions as representatives of the Interstate Commerce Commission to secure evidence and render findings which could in turn be approved by the Federal Commission.

IN view of the discontent on the part of many with the present system of Federal regulation and criticism which has been voiced in influential quarters, it is likely that something will be done in the not distant future regarding the powers and methods of procedure of

the Interstate Commerce Commission. Symptoms of a reaction to unified control are now apparent.

"The present demand is not for further expansion of Federal regulation, but for the removal of restraints upon the exercise by the states of much of the power which they exercised prior to 1920."

Whether we shall ever return to the standards of that era is, however, questionable. There is no denying the economic fact that the regulation of interstate commerce is primarily a matter of national and not state interest. All that can be hoped for is some administrative device which will make possible a more expeditious and efficient functioning of the regulatory process.

—ISADOR LUBIN.

THE DISTRIBUTION OF POWER TO REGULATE INTERSTATE CARRIERS BETWEEN THE NATION AND THE STATES. By George C. Reynolds, Ph.D. 8vo. New York: Columbia University Press. 434 pages. 1928. $6.50.

Economic Factors that Underlie Public Utility Rate-Making

SINCE the decision of the Supreme Court in the Munn *v.* Illinois case (94 U. S. 113) in 1877 public utility enterprises have been subject to public regulation. The power to regulate is a legislative function, based on the police power of the State or Federal Government, but subject to judicial review.

During the last fifty years the question of regulation of public utilities has increased in importance with the growth of the utilities and the increased dependence on them resulting from the concentration of population.

Mr. Groninger set himself to the task of "presenting a brief but comprehensive outline of public utility rate making and court review of rate orders."

He turns first to the question of the rights of the public to regulate a private industry that only performs its services with the consent of the sovereignty. He then turns to the limitations placed on the power of regulation; the limitations on the profits of a utility and the relation existing between a public service company and its customers and the municipality.

THE most lengthy and detailed part of his work is devoted to the rate base to be employed in rate regulation. As long as the law of the land is such as was laid down in the Smith v. Ames case (169 U. S. 466) introducing the "fair value of the property" as being the just basis on which any rate regulation must be based, there will continue to be indefiniteness of the whole question of regulation. By quoting from the decisions of the courts in case after case brought before them where one or another of the "relevant factors" to be considered in deciding the "fair value," Mr. Groninger clearly shows that the real key to the question of effective regulation is to be found, not in the legislative or administrative Commissions established to perform some legislative function, but in the attitude of the surpeme court.

The work is written almost entirely from a legal point of view and though the citations are the law of the land, the author expresses his personal interests when he points out the inequalities of past litigation between the public and the public service corporations. He says that the public has law departments "not equipped with the means of legal warfare" such as appraisal engineering assistance, accounting aid, and lawyers trained in the field of utility regulation, while on the other hand the utilities employ and maintain the best brains of the country because the services of such men are paid for by the public, at no actual cost to the utilities.

In the chapter on the Smith *v.* Ames case he clearly points out that both fair value and fair return have been matters of dispute resulting in confusion, uncertainty, delay and large expenditures of money in rate cases. Mr. Groninger is of the opinion that the cost of reproduction as a factor in rate regulation is strictly theoretical and the results are based on guess work, assumptions and conjectures. He advocates in place of the relevant factors as set forth by the Supreme Court in the Smith *v.* Ames case, and subsequent decisions on the question of the proper base to be employed as a basis for rate regulation, that of prudent investment.

The latter part of his book is given to court reviews of rate orders; definition of public utilities; summaries of the O'Fallon and the Indianapolis Water cases and the revised rules of the Supreme Court.

Anyone interested in the question of regulation of public utilities, whether lawyers, economists, appraisal engineers, or politicians will have recourse to Mr. Groninger's work, which contains a wealth of information, gathered from numerous court decisions and statutory laws, and presented with a great deal of accuracy and care.

—JOHN M. BOATWRIGHT.

PUBLIC UTILITY RATE MAKING. By Taylor E. Groninger. 8vo. Indianapolis: The Bobbs-Merrill Co. 380 pages. 1928. $7.50.

Publications Received

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FRONTIERS OF TRADE. By Julius Klein. New York: The Century Co. 8vo. 328 pages. $2.50.

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The March of Events

Alabama

Competency of Judge in Refund Case

THE competency of Judge Tisdale J. Touart, of the inferior civil court, to preside in the test case brought by a consumer of the Alabama Power Company in Mobile to obtain refunds on bills covering a period of two years, was challenged by the company on the ground that the judge himself would be entitled to a refund on his bills if the case were decided against the company. Judge Touart retired from the case and Special Judge George A. Sossamen took his place.

The suit was filed at the instance of the city commission and depended on the city's contention that 12,000 customers in Mobile should have been granted rates as low as those in Montgomery immediately after the extension of hydroelectric lines to the city of Mobile early in 1927. The right of Mobile consumers to these rates at that time is claimed under an order approved by the Commission in March 1923, containing the so-called Montgomery rates, purportedly made available to the hydroelectric served community of 7,000 or more consumers. The customers in Mobile had continued on higher rates until the Commission issued an order December 31, 1928, prescribing a schedule of standard household rates throughout the state.

Arizona

City Sells Light Plant

THE Central Arizona Light & Power Company, says the Winslow *Mail*, on March 16th took over the operation of the Tempe gas and electric service under a certificate of convenience and necessity granted by the Commission authorizing the purchase of the municipal utility for a consideration of $162,000.

It is reported that the company will take over the entire gas and electric power distribution system in Tempe, and that a 10 per cent reduction in gas rates and a reduction ranging from 14 to 40 per cent in electric rates will result under the transfer.

Arkansas

Sale of Utility Plant

NEGOTIATIONS which have been carried on for several months, it is reported in the Little Rock *Gazette*, have resulted in the purchase by the Arkansas Power & Light Company of the Arkansas Public Service Company holdings in six towns and three counties in the state of Arkansas. The transaction is said to involve about $750,000.

Officials of the Arkansas Power & Light Company have begun taking charge of the new properties, which will be linked with the company's super-interconnected power system. The Arkansas Public Service Company is a subsidiary of the Central States Public Service Company, controlled by Davenport, Iowa, interests.

California

Nation-wide Phone Investigation

THE Assembly federal relations committee on April 4th, by vote of four to one, recommended adoption of a memorial to Congress urging that the investigation proposed by United States Senator Hiram W. Johnson into telephone rates be immediately authorized. It is contended by the backers of the investigation that the San Francisco rate proceedings are not a local matter in any sense, but one with which all California

and the country at large is vitally concerned. They assert that nothing less than an investigation on a national scale can dig out the innumerable ramifications of the telephone companies.

Senator Johnson's measure would provide for a senatorial inquiry into the entire telephone business, the inter-relation of holding companies and subsidiaries, and the question of just and equitable rates.

Los Angeles Street Car Fares

THE Pacific Electric Railway Company on April 2nd filed with the Commission an application for authority to increase fares on many of its lines.

A resolution was introduced in the city council to secure municipal opposition to the proposed increase. Concerted action by the cities of Los Angeles, Glendale, Burbank, Pasadena, South Pasadena, and Long Beach to prevent the proposed fare increases is anticipated. The revised schedules affect all of these localities.

The company asserts that it lost $824,409 more last year than it did in 1927 and that it was not receiving the return it should receive from its property valued at $90,000,000. The company has been operating for a trial period of one year under fares materially lower than those which formerly were in effect.

District of Columbia

Possible Phone Rate Raise

POSSIBILITY that the Chesapeake & Potomac Telephone Company may in the near future apply to the Public Utilities Commission for an increase in rates, says the Washington *Times*, has resulted in Byers McK. Bachman, chief statistical accountant for the Commission, starting a survey of the earnings and expenditures of the company. It is reported that in January of this year the company shows a net income of $145,473.09 and in February $136,757.49, as against $139,365.40 in January 1928, and $123,692.73 for February of that year. Ralph B. Fleharty, peoples' counsel is also studying operations.

Georgia

Hearing on Electric Rates

A downward revision of commercial light and power rates was sought by a large number of Georgia communities before the Commission on April 8th. Following the presentation of evidence the Commission granted to both sides sixty days in which to file briefs.

Preston S. Arkwright, president of the Georgia Power Company, declared the proposed plan of putting commercial light and power rates on the same rate schedule as residences would cut the commercial revenues of the company more than $1,375,000. or 45.1 per cent, which no company could stand. He declared commercial light and power rates are lower in Georgia now than they were in 1918.

City Attorney James L. Mayson of Atlanta, appearing in behalf of lower commercial rates, said that certain food dealers' associations asked that commercial light and power rates be fixed at the same cost as residential rates, without any service charge on meters of less than 25-ampere capacity.

One of the witnesses against the utility, who represented the Atlanta Retail Food Dealers' Association, declared that his light and power bill had increased from $5 to $20 a month during the last ten years while his residential bill was cut from about $20 to $10 under the recent order of the Commission. On cross-examination, however, he admitted that a frigidaire system, an electric coffee mill, and other electric equipment in his store are more economical than the old icing system, and more satisfactory in every way.

Chairman James A. Perry, after calling the hearing to order, announced that the Commission had instituted the investigation after discovering that commercial light and power rates vary in different communities. The Commission believes that there should be uniformity.

Illinois

One Thousand Witnesses

MORE than 1000 citizens of the west and northwest districts of Chicago were to testify as witnesses for feeder busses before the Illinois Commerce Commission, according to an announcement by Attorney Oliver W. Holmes, president of the Northwest Federation of Improvements Clubs, reported in the Chicago *Tribune*. Some of the witnesses who have already testified allege that the vibration of the busses operated by the Chicago Motor Coach Company for a 10-cent fare loosened gas ranges and other fixtures in homes of the complainants. Twenty-two witnesses testified at the hearing on April 3rd. Retarding of real estate development is also blamed on the present system.

Indiana

Power Rate Revision

A petition signed by fourteen industrial firms of Indianapolis, filed with the Commission on April 11th, sought a revision of larger power consumers' rates of the Indianapolis Power & Light Company so that readings and billings of the demand charges would be made each month. Objection is made to the maximum demand holding on for the period of a year.

This, it is contended, will allow consumers having seasonal loads the advantage of paying only for what they are pulling during slack times or periods when the plants are shut down.

Gas Plant Acquisition by City

TRUSTEES and directors of the Citizens Gas Company on April 3rd declared a $5 payment on each $25 common stock certificate plus 1¼ per cent dividend, to be distributed in May, as a step in the proceedings for the city of Indianapolis to take over the property and assets of the utility after $2,000,000 in common stock certificates and $1,000,000 in preferred stock have been redeemed. This action was taken over the protest of attorneys for a group of certificate holders who called on the gas officials to cease their moves in co-operation with city officials.

The officials of the company have recognized the trust created at the time of the company's organization in 1905 under which the city is given the right to take over the property and assets of the plant pursuant to the terms of the franchise and articles of association. The board of trustees has resolved to "proceed in all lawful ways to carry out all its obligations of such company to its certificate holders and preferred shareholders, and that upon the discharge of such obligations, the property and assets of said company be conveyed and transferred to the city of Indianapolis and said conveyance to be made as soon as that can reasonably be done."

A bitter fight in the courts is anticipated, says the Indianapolis *News*, and officials of the gas company and the city have retained attorneys to protect the voting-trust plan under which the company was organized. Stock certificate holders, on the other hand, have employed lawyers to attempt to break down the city's right to take over the property. They have intimated that there may be individual responsibility falling on directors of the company in case they act without court approval.

Arguments Heard in Phone Appeal

ARGUMENTS were heard by members of the supreme court on April 3rd on the appeal by the city of Valparaiso in the North Western Indiana Telephone Company case. Bruce B. Loring, city attorney of Valparaiso, the Indianapolis *News* tells us, presented arguments attacking the constitutionality of the 1927 Public Service Commission appeal law under which the Lake county circuit court in June 1928 reversed a Commission ruling which prohibited the sale of the North Western Indiana Telephone Company stock and division of its property to the Crown Point Telephone Company and the Winona Telephone Company.

Attorneys for the telephone companies asserted that the city was not a party to the action in the Lake county court and, therefore, had no right to appeal the case to the supreme court.

The city attorney contended that the Lake county court's order was not binding on the

Commission and was unlawful because the Commission had not been made a party to the action, had not been served with a notice, and further because the act itself under which the appeal was taken was not legal. In answer company attorneys asserted the appeal to the Lake county court had followed regularly the statutory requirements in effect before the appeal act was amended by the 1929 legislature, and that nowhere in its appeal to the supreme court had the representatives of the city complained that the lower court's decision was not based on sufficient evidence.

Kansas

New Gas Rates Requested

AN application for a new schedule of gas rates in Pittsburg and vicinity was filed with the Commission on April 4th by the Pittsburg Gas Company, according to a report in the Topeka *Capital*. The company had filed a petition for an order in the Shawnee county district court temporarily restraining the Commission from interfering with the new schedule.

In asking for the restraining order the company declared it had asked for a new schedule last August but no action had been taken by the Commission. A new Commission, however, has taken charge of matters since that time, and its attitude towards the company's plea is being awaited.

Louisiana

Gas Rate Hearing

THE application of the city of Shreveport for a reduction of industrial and domestic gas rates will be heard by Public Service Commissioner Harvey G. Fields on May 6th provided other Commissioners grant the request for the hearing on that date, it has been announced in a recent issue of the Shreveport *Times*.

Council Refuses Plea for One-Man Cars

THE Shreveport city council denied the right of the Shreveport Railway Company to operate one-man cars after the presentation of a petition by the company for the repeal of an old ordinance prohibiting one-man cars except on two lines. A hearing was held at which protestants against the one-man car plan were said to be numerous and demonstrative.

Formal resolutions of protest were received from the Building Trades Council, the Carpenters Union, and the Order of Railway Trainmen. Representatives of the railway dwelt on the necessity of effecting such economies in the operation of the street car company in order that the stockholders might earn something on their investment.

It was said that improvements in the one-man car had removed the objection of racial contact with passengers; that the element of public safety had been looked after to such an extent that the cars were practically accident proof; that 213 American cities use the one-man car exclusively and 230 other cities use it on most of their lines; that it would take two or three years to make the change; and that none of the car employees of the railway company who could operate the new one-man car would be discharged by the company.

Maryland

Appeal in Fare Case

ANOTHER step has been taken in getting the United Railways car fare case before the Supreme Court. The Commission on April 9th filed a cross bill opposing the appeal filed by the railway company on March 20th.

The Commission challenges the claim of the railway that the present rate of return on a $75,000,000 valuation is confiscatory and in violation of the 14th Amendment of the

Constitution. The Commission also alleges error on the part of the court of appeals in requiring the Commission to figure depreciation of the property on the basis of replacement value rather than on its actual cost.

The court of appeals recently decided that the return of 6.26 per cent allowed by the Commission was not confiscatory. The company alleges confiscation and is trying to get permission to charge a straight 10-cent fare.

Massachusetts

Bills Introduced to Secure Power Investigation

Two new proposals, says the Boston *Transcript*, have been filed in the House for investigation into the activities of power companies in connection with the operation of holding companies and with dissemination of propaganda.

One of the bills calls for the appointment of a special committee of two senators appointed by the president of the Senate and five representatives appointed by the speaker of the House to investigate foreign control of local gas and electric utilities and also to investigate the financial interest, if any, of foreign corporations in publishing or other enterprises in the Commonwealth not engaged in public utilities and the extent to which Massachusetts gas or electric corporations are controlled by holding companies, trusts, or voluntary associations, etc.

The committee would also investigate the activities in the Commonwealth of the National Electric Light Association, the American Gas Association, and the New England Bureau of Public Service Information, in connection with "the dissemination of publicity and other material, commonly known as propaganda in newspapers and other publications, and in schools and other educational institutions; and in connection with attempts, if any, to influence or affect the teaching of subjects relating to public utilities and especially attempts to create a prejudice against public ownership of utilities; and the expenditures, if any, in connection therewith."

The committee would also investigate the Massachusetts Electric and Gas Association and the Association of Massachusetts Gas Companies "in connection with attempts, if any, to influence legislation affecting public utilities in this Commonwealth, and the expenditures, if any, in connection therewith."

The other proposal provides that a special committee of five members of the House of Representatives shall be appointed by the speaker to consider and investigate, "the activities in this Commonwealth of certain power and pulp manufacturing companies, power and light, and other interests, to ascertain the extent to which such companies or interests have, directly or indirectly, exercised or attempted to exercise or are attempting to exercise any influence in the shaping of public sentiment in this Commonwealth by propaganda or through the expenditure of money, or by any other means, in connection with any university, technical institute, private school, public schools, or commercial association or newspapers of the Commonwealth."

City Patrons Get Free Electricity

Bills amounting to $53,000 for electric service, says the Boston *Advertiser*, are owed to the city of Concord by more than 650 users of the municipally supplied electricity. A report by the chief examiner of the state division of accounts shows that sums ranging from $1 to $2185 are owed to the city, because of the laxity of bookkeeping and neglect of meter readers to call at various homes.

Some residents, it is stated, have been supplied with electric light and power for five years, without ever getting a bill or having their meters read. On several occasions, the auditors found, persons had complained at not receiving bills, and the town bookkeeper had made them out a bill without regard to the amount due the city, or the meter readings on file.

Scores of account cards were found in the "discontinued" files, while examination showed electricity had been continually supplied.

A special town meeting, it is reported in the Boston *Transcript*, will be held May 6th to consider the sale of the municipal electric light plant. A committee has been asked to submit to the meeting its opinion on whether to sell the plant, keep it and buy current wholesale from outside, or enlarge its capacity and continue to generate current for local use.

Investigation of Holyoke Plant

THE Board of Aldermen of Holyoke on April 5th provided for an appropriation of $10,000 to finance an investigation of the Municipal Gas and Electric Department, under the supervision of Mayor Fred G. Burnham. A stormy session preceded the passage of the resolution. There was an unusually huge gathering on hand to witness the proceedings, the second house flowing out of the chambers and packing the corridors all about the session. Old timers remarked that in all their years of observing political events in Holyoke, they had never seen such intense interest and such deep hostility over a move as these people who listened in on the meeting showed.

A petition of ten local taxpayers, it is reported in the Holyoke *Transcript*, was to be filed in the superior court seeking an injunction to restrain the city treasurer from paying out any money to defray the expenses of the proposed probe.

Minnesota

Hearings on Duluth Fares

A hearing on the application for higher street car fares in Duluth was begun before Commissioners C. J. Laurisch and Frank W. Matson on April 2nd.

A petition had been filed by the company for higher fares on January 26th on the ground that the present rate of return for valuation is only 3.45 per cent while the company is entitled to realize a return of 7.5 per cent on the present value of its property. The present fare in Duluth is 8 cents cash or five tokens for 35 cents.

Nevada

Expense of Federal and State Co-operation

A RESOLUTION was approved on March 25th by the Nevada legislature recommending that Congress appropriate not less than $100,000 annually for the use of the Interstate Commerce Commission to meet the costs incident to co-operation between the State and Federal Commissions under § 13 of the Interstate Commerce Act.

Many co-operative cases are now pending wherein, upon invitation of the Interstate Commission, State Commissions are co-operating; and since the purpose of such co-operation is to enable the Interstate Commission to exercise its enlarged powers in conformity with the Federal Constitution, and in such manner that there shall be no conflict between interstate rates and properly constructed intrastate rates, the legislature takes the position that the services of State Commissioners in co-operative proceedings are in fact rendered to enable the proper administration of Federal law and that the Federal Government should provide for the substantial expenses in such proceedings.

New Jersey

Gas Rate Readjustment

THE hearing before the Commission on the proposed readjustment of gas rates of the Public Service Electric & Gas Company was postponed again on April 2nd. The hearings now are scheduled for May 6, 8, 13, 15, 17, and 27th.

John J. Treacy, representing certain municipalities, notified the Commission and the utility company that he would oppose the admission into the case of the report of Lucas and Luick, Chicago engineers engaged by the Commission to investigate the merits of the proposed adjustment. The report was favorable to the approval and inauguration of the new schedule.

Attorney George H. Blake, representing the company, declared that this case differs from the usual rate case; that it is one of adjustment, not a rate increase in the usual sense.

Rehearing Asked On Water Rates

NEW evidence and facts to the present not considered in the opinion written by Judge Joseph L. Bodine and signed after his resignation by Judge William L. Runyon were the basis of a move to reopen the Elizabethtown Water Company rate case on April 15th. It was argued that the company had abandoned certain property and privileges which affected the value of the water company's property and thereby affected the rates.

The decision by the court gave the Elizabethtown Water Company an increase of 40 per cent in its rates and fixed the value of its property for rate-making purposes at $10,000,000. It overruled a decision of the Commission announced in 1927 which gave the company a 16 per cent increase and set the value of the property at $6,650,000. The company had sought a 40 per cent increase.

New York

Interborough Rapid Transit Fare Case

THE decision by the United States Supreme Court handed down on April 8th reversing a lower court decree restraining state officials from enforcing a 5-cent fare on the New York subway and elevated line has thrown the controversy back into the state courts. The Supreme Court based its holdings partly upon the ground that remedies in state tribunals had not been exhausted.

Three suits have been pending in the state courts during the time the injunction matter has been before the Federal Courts. Two of these were brought by the Transit Commission and one by the city. One of the actions seeks a declaratory judgment on the main issue in litigation, namely, whether the Transit Commission has the power to raise the fare on the Interborough in view of the dual subway contract stipulating that the fare shall be 5 cents and no more. The other two suits are for injunctions to prevent the Interborough Company from raising its fare.

The transit company, it is reported, has taken the precaution since the Supreme Court's ruling to repost notices of the filing of the higher fare schedule in all subway and elevated stations where the posters put up in February 1928 had disappeared. This was done in order that there might be no technical slip contrary to the statutory requirement of notices if the company should seek to enforce the higher fare.

Utica Rate Hearing

THE investigation by the Commission of the rates of the Utica Gas & Electric Company was resumed on April 15th before Commissioner Neal Brewster, at which time the villages of Yorkville and New York Mills were entered as additional complainants. The opening session was occupied with the introduction of evidence on the question of value.

An agreement was reached, it is stated in the Utica *Press*, that engineers representing the company, the city, and the Public Service Commission, would check the company's inventory with details from working sheets as to quantities and prices as a basis for conclusions by the city's experts. Where there are disagreements they will be brought before the Commission at a hearing to be held at some future time in order to take testimony.

North Carolina

Move to Investigate Power Rate

THE Board of City Commissioners of Wilmington on April 3rd started a movement to have a Commission investigation of the power and gas rates of the Tidewater Power Company. The Chamber of Commerce called attention to the alleged excessive power rates, as the result of a complaint made by the Oelgado Cotton Mills that the Tidewater rate is considerably higher than the rates of the Carolina Power & Light Company and the Duke Power Company.

F. A. Matthes, executive vice-president of the Tidewater, and Raymond Hunt, general manager, it is reported, asked the Commissioners to defer action on the proposal for

ninety days that officials might have an opportunity of ascertaining the savings to be realized by industries in the reduction in power rates announced by the company effective April 1st. The complainant argues that the reduction will not offer any appreciable benefit and is demanding other concessions by the company.

Ohio

More Time Granted in Gas Case

THE hearing on the application of the Columbus Gas & Fuel Company and the Federal Gas & Fuel Company to submit new evidence in the 5-year-old gas rate fight, says the Columbus *Dispatch*, was postponed on April 1st until May 1st by Judge Benson W. Hough in Federal Court at the request of attorney Charles A. Leach, representing the municipality.

It is claimed by the companies that the profit on the capital invested was only 6.11 to 3.85 per cent, depending on conditions, instead of 7.07 per cent as indicated by the evidence on which Judge Hough based his ruling which is under review.

The city ordinance calling for a 40-cent rate, which the companies fought in Federal Court as confiscatory, will expire in August. The company's move to reopen the fight is regarded by some as an attempt to obtain a basis for a higher gas rate when a new ordinance is passed, and as a move to obtain for the companies the $1,500,000 impounded as money collected over and above the 40-cent ordinance and the temporary rate of 48 cents set by Judge Hough.

Akron Street Car Fares

AN offer of a new traction fare has been made by A. C. Blinn, vice president and general manager of the Northern Ohio Power & Light Company, to the Akron city council public utility committee, contingent on the city waiving all Northern Ohio Power paving assessments on certain streets and street sweeping charges for 1929. The new proposal is for the approval by the city of 10 cents cash, 7 tokens for 50 cents and 15 tokens for $1.

The committee had, previous to this offer, figured every possible rate set-up that had been mentioned, in an effort to arrive at some combination that would produce the $3,230,000 revenue set up by a citizens' traction committee as necessary to pay all expenses and a return on the investment. Resistance to the 10-cent cash fare by one of the committee members led Mr. Blinn earlier in the negotiations to propose an 8-cent flat fare with no tokens or tickets. This proposal was never given consideration by the committee.

Pennsylvania

End of Water Case in Sight

HEARINGS in the rate case of the Scranton-Spring Brook Water Service Company at Harrisburg were terminated on April 10th. At the next hearings engineers for the complainants were to be cross-examined on the evidence already submitted. After that arguments of both sides would be presented and the case would be practically ended.

It is not known exactly how long this will take. After closing arguments are made the Commission will take all evidence under consideration and make a thorough study of it. The information entered in the record will be checked by Commission engineers and accountants before announcing the final decision. The record is extremely lengthy.

The annual report of the corporation made public recently, it is stated in the Wilkes-Barre *Independent*, shows that the gross revenue for the year was $4,925,050 while that for the twelve months ending January 31, 1928 was $5,198,082. The gross income was $3,267,271 as compared to $2,450,420 for the preceding year. Operating expenses, maintenance, and taxes other than Federal income taxes were reported at $1,657,779 as against $1,657,662 for the preceding twelve months.

The company is now operating under temporary increased rates pending the final decision by the Commission on its application for a higher return.

Vermont

Electric Rate Probe

THE Commission on April 10th, acting upon authority conferred by the 1929 General Assembly, sent out an order to all individuals, partnerships, associations, corporations, and municipalities owning or conducting a public service business furnishing electricity to file data regarding their rates.

The resolution providing for the general investigation by the Commission contained an appropriation of $5000 to carry it on.

Hearings by Commission

FOURTEEN cases on April 3rd had been set down for hearing within the months of April and May. These involved railroad crossing cases, motor carrier cases, and cases relating to the sale of utility property.

A hearing was scheduled on the application of the Burlington Traction Company for permission to amend its articles of association to change its name to the Burlington Rapid Transit Company, Incorporated. A petition was also before the Commission for permission to amend the articles of association of the Sharon Power Company.

One petition sought an order forcing the furnishing of electric service by a utility to a resident.

Virginia

City Contract for Power

THE Bull Run Power Company owned by local merchants, at Manassas, it is reported in the Washington *Star*, has been given a 5-year contract by the town of Manassas. The town operates a municipal plant and, save for that part of the plant which controls the water supply, it will be closed down.

Under the terms of the contract, as reported in the *Star*, the town purchases current at a flat rate and resells it to the local consumers.

Washington

Public Utility Legislation

A BILL has been passed by the legislature providing for a fee of $\frac{1}{10}$ of 1 per cent of the annual gross operating revenues of all public service companies subject to the jurisdiction of the Department except auto transportation companies and certified steamboat companies. The auto transportation companies and certified steamboat companies were omitted because the first now pays a fee of 1 per cent and the second pays a fee of $\frac{1}{4}$ of 1 per cent. The moneys earned by this new fee bill go into the Public Service Revolving Fund and will be used to help defray the expenses incurred by the Department.

The provision of the Public Service Commission Act making tow boats common carriers and subject to the regulations of the Department has been repealed.

A bill designed to make valuations of public service companies made by the Department admissible for tax purposes was defeated.

The members of the legislature also defeated a bill providing a speed limit of thirty miles per hour for auto stages. The speed limit in Washington for automobiles is forty miles per hour.

West Virginia

Gas Rate Increase Proposed

AN application for authority to increase gas rates in 57 southern West Virginia cities, towns, and districts was filed with the Commission on April 2nd by the United Fuel Gas Company. The proposed rates range in various localities from 35 cents to 50 cents a thousand feet. The Commission set the hearing down for May 7th.

It is stated in the Charleston *Gazette* that as the new rates affect so many communities, it is probable that an alliance will be formed to retain special counsel in addition to the regularly employed city solicitors, in order to oppose the new tariffs.

Public Utilities Reports

COMPRISING THE DECISIONS, ORDERS AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

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MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES.

RE SPRINGFIELD GAS LIGHT COMPANY.

[D. P. U. 3422.]

Service — Gas — Experimental reduction in British Thermal Units.
The Commission refused to authorize an experimental change in the standard of British Thermal Unit contents for gas service where opposition to the change was so pronounced that a fair trial of the substituted standard, which would require the co-operation of the consumers, could not be had.

[February 26, 1929.]

PETITION of a gas company for authority to supply gas at reduced heating value; authority refused and petition dismissed.

By the **Department:** This is an application of the Springfield Gas Light Company for exemption from furnishing gas of the calorific standard heretofore established by the Department and for authority to supply gas of the calorific standard of 500 B.T.U. until otherwise ordered by the Department.

Public hearings were held, at which the company and various protestants appeared and presented evidence. In addition, the Department's director of its gas and electric division presented his views.

In D. P. U. 3223, P.U.R.1929A, 229, 231, we discussed the question of permitting the Springfield Gas Light Company to supply gas of the calorific standard of 500 B.T.U. with a compensating reduction of 5 cents per thousand cubic feet from the price we would otherwise establish and said that we felt that any such change should not be made without a public hearing which would give an opportunity to customers affected to be heard as to the advisability of changing the standard. We also there stated: "Last spring . . . on the advice of our director of the gas and electric division, we were inclined to the opinion that, if the company could see its way clear to make a reduction of 5 cents per thousand in its commodity price, it would be wise, in view of the kind of gas that the Springfield Gas Light Company was making, to reduce the standard to 500 B.T.U. There are many gas engineers who are convinced that,

in the making of certain types of gas, advantages are derived by the public in a lower British Thermal Unit standard with a reduced price, it being contended that the lower British Thermal Unit gas is a firmer gas and results in a more uniform quality of gas at the burner."

No evidence was adduced at the hearings on this petition to cause us to change our tentative views, but an experiment of this sort, cannot, in our opinion, be effectively tried except with the fair co-operation of the consumers. At the hearings on this petition it appeared that there was substantial opposition to the change in the standard. This opposition was such as to indicate that a fair trial of the change would be unlikely at this time. We are, therefore, not now disposed to authorize the change. As a result, we are of the opinion that the company should be permitted to establish a net maximum commodity charge of $1.10 per thousand cubic feet and a service charge of 50 cents a month.

UNITED STATES SUPREME COURT.

JOHN F. GILCHRIST et al.

v.

INTERBOROUGH RAPID TRANSIT COMPANY et al.

(— U. S. —, — L. ed. —, — Sup. Ct. Rep. —.)

Injunction — Exhaustion of state remedies — Improper state action.

1. It is necessary to show that the Commission has taken or is about to take some improper action and that its orders will result in confiscation, in order to support the action of a Federal Court in granting relief to a utility before appellate remedies provided by the state are exhausted, p. 451.

Commissions — Refusal to take jurisdiction — Initiation of court proceedings.

2. The action of a Transit Commission in taking the position that it lacked jurisdiction to grant a rate increase to a utility operating under alleged irrevocable rate contracts, and in seeking to enforce the city's supposed rights under such contracts by proceedings in the state courts, was held to be neither unreasonable nor arbitrary where there was no reason to anticipate undue delay or hardships, p. 451.

P.U.R.1929B.

Rates — Contracts — Proper forum for construction.

3. The effect of rate contracts between a city and a utility concerning the operation of railway property as public highways, depending on the proper construction of state statutes, is a matter primarily for the determination of the state courts, p. 451.

Appeal and review — Proper evidence on appeal — Conduct of parties.

4. Alleged newspaper stories and unbecoming declarations by counsel or city officials as to the course to be pursued by the city and Transit Commission to protect alleged rights under certain rate contracts with a transit utility cannot be regarded on appeal as of grave importance when the action in fact taken by such parties was not improper, p. 451.

Injunction — Exhaustion of state remedies — Orderly state procedure.

5. A utility required by law to apply to the Commission for rate relief before resorting to Federal Courts cannot, after making such application, defeat orderly action thereon by alleging an intent to deny the relief sought, p. 452.

Rates — Contracts — Authorization by statutes.

6. The contention that rate contracts for the operation of transit lines adopted subsequent to the Public Service Commission Law imposed no inflexible rate of fare was held to be erroneous where such a contract was expressly authorized by the legislature by amendment to the existing law, p. 452.

Return — Property owned by city — Subways.

7. The claim for an 8 per cent return upon the value of subways which are property of a city and distinctly declared by statute to be public streets was held to be unprecedented and inacceptable in view of the insufficient reason presented therefor, p. 453.

Injunction — Right of Commission to proceed in state courts.

8. The purpose of the Commission to test its jurisdiction to change a 5-cent rate for a city transit system fixed in a contract, by an immediate and orderly appeal to the courts of the state, should not be thwarted by an injunction from the Federal Court, p. 454.

Return — Operations as a whole — Subway and elevated lines — Rate base.

9. The court was unable to accept the theory that subways owned by a city and operated by a private corporation and elevated transit facilities leased by the corporation from another company constituted a unified system for rate-making purposes, p. 454.

Return — Confiscation — Subway and elevated return apportionable.

10. A 5-cent rate on elevated and subway lines was held not to have been shown confiscatory considering the probable fair value of subway properties alone; and an interlocutory decree granted by a lower court, holding that such confiscation existed, was reversed because of an erroneous assumption that the subways as well as the elevated lines should be considered as a unit for rate making, p. 454.

Contracts — Power of a city — Railway property as highways.

Discussion of the power of a city to enter into contracts with a transit utility to secure operation of railway property declared by statute to be part of public streets and highways and, therefore, the property of such city, p. 451.

(VAN DEVANTER, SUTHERLAND and BUTLER, Justices, dissent.)

[April 8, 1929.]

APPEAL by the New York Transit Commission and others from a decree of the Federal statutory Three-Judge Court granting an injunction to a rapid transit company restraining the Commission from interfering with certain rates of the utility; lower court reversed and cause remanded; interlocutory injunction dissolved.

Mr. Justice **McReynolds** delivered the opinion of the Court: This direct appeal is from an order of May 10, 1928, 26 F. (2d) 912, P.U.R.1928D, 92, by the District Court, Southern District of New York, three judges sitting, which authorized an interlocutory injunction to restrain appellants—the Transit Commission and New York city—from requiring or attempting to enforce further acceptance by the Interborough Rapid Transit Company of a 5-cent passenger fare over the lines operated by it and from seeking to prevent a charge of 7 cents. This Court stayed the order pending further hearing. The cause has been twice orally argued before us and helpful briefs are on file.

In support of the action below appellees maintain:—The 5-cent fare originally stipulated and long observed had become noncompensatory. Although specified in the agreements with the city under which the transit lines are being operated that fare was not immutable, since, by implication, provisions of the Public Service Law of 1907 directing that reasonable rates should be granted to subways, elevated and other street railways were incorporated into the contracts. The Transit Commission in effect denied an application for compensatory rates, insisted upon observance of the 5-cent one and intended to take immediate steps to secure enforcement of it. This amounted to action by the state which would deprive the Interborough Company of property without due process of law, contrary to the 14th Amendment.

The City of New York is a municipal corporation whose charter vests control of streets and other executive powers in the Board of Estimate and Apportionment. The Transit Commission of three members, created by Chap. 134, New York Laws, 1921, exercises powers theretofore entrusted to the Public Service Commission for the First District (Chap. 429, Laws 1907), successor to the Board of Rapid Transit Railroad Commissioners organized under the Rapid Transit Act of 1891.

The Interborough Rapid Transit Company, a New York corporation with $35,000,000 capital stock, operates elevated and subway lines in four boroughs of Greater New York city. Some of these it owns; some the city owns and lets to it for operation; others—the original elevated lines—it hired in 1903 from the Manhattan Railway Company for 999 years, agreeing to pay therefor interest of $45,000,000 of outstanding bonds, 7 per cent (now 5 per cent), on $60,000,000 capital stock of the lessor and $35,000 annually for administrative expenses. At this time the total yearly payments for use of elevated lines is about $4,900,000.

Greater New York city contains five boroughs—Manhattan, coterminous with Manhattan Island (ten miles long) with an area of 19 square miles; the Bronx, 41 square miles; Queens, 117; Brooklyn, 80, and Richmond (Staten Island) 57. The population of the city in 1910 was 4,785,000 (in 1927, 5,970,000) of whom 2,330,000 resided within Manhattan in the southern portion of which are located the great business centers of the metropolitan district. The Bronx on the mainland north of Harlem river, and Queens and Brooklyn on Long Island, have undergone very rapid development and increased greatly in population since 1900. The expense of the greater city, together with its peculiar physical characteristics render exceedingly difficult any effort to provide rapid and cheap transportation for its residents and the crowds of outsiders who travel therein daily for business or pleasure. (See Sun Printing & Publishing Asso. v. New York, 152 N. Y. 257, 273, 46 N. E. 499.)

Prior to 1903, under franchises dating from 1875, the Manhattan Railway, or its predecessors, constructed, owned, and

operated the four original elevated railway lines extending northward from South Ferry along Second, Third, Sixth, and Ninth avenues. All these were leased by the Interborough Company in 1903 and now constitute the oldest part of its system. Long before and ever since 1913 they have charged 5 cents per passenger and from this the lessee for many years derived substantial net profits. During 1910 and 1914 the average was $1,589,348.

The subway first constructed begins at city hall, Manhattan, and extends northward to Ninety-sixth street—6 miles.[1] From the latter point two branches diverge; one continues north across Harlem river to 230th street, in the Bronx—7 miles; the other (West Farms branch) runs northeast and under Harlem river to 182d street at Bronx Park—7 miles. These lines were constructed for the city, became its property and were let to the Interborough's assignor under "Contract No. 1," executed Feb. 21, 1900,[2] and authorized by the Rapid Transit Act of 1891 as amended.

This contract—an elaborate instrument of 125 printed pages—provided with great detail that the lessee should equip and thereafter operate the road at its own expense under direction of the Board of Rapid Transit Railroad Commissioners; and further undertook to secure uninterrupted service. Among other things it declared: "The contractor (Interborough's assignor) shall during the term of the lease be entitled to charge for a single fare upon the railroad the sum of 5 cents, but not more. The contractor may provide additional conveniences for such passengers as shall desire the same upon not to exceed one car upon each train, and may collect from each passenger in such car a reasonable charge for such additional convenience furnished him, provided that the amount to be charged therefor and the character of such additional convenience shall from time to time be subject to the approval of the Board. The contractor may provide not to exceed one car in each train for persons smoking."

The lease was for fifty years (with right of renewal), the rent a sum equal to the annual interest on city bonds issued to secure

[1] These and similar figures are mere rough approximations.

[2] This and subsequent contracts designate agreements for operation as leases.

the necessary funds for construction, plus 1 per centum for amortization. The lessee retained title to all equipment and the city agreed to purchase this at fair value when the lease ended.

Construction under contract No. 1 cost the city around $60,000,000.[3]

By "contract No. 2," dated July 21, 1902, the city contracted with the Interborough's assignor for the construction and operation during thirty-five years (with privilege of renewal) of an extention to the first subway, commencing at city hall, Manhattan, and extending under East river to Borough Hall and thence to Atlantic avenue, Brooklyn—4 miles. The lessee undertook to furnish equipment, act under direction of the Board of Rapid Transit Railroad Commissioners and to pay for use of the line a sum equal to the interest on bonds issued by the city to meet construction costs, plus 1 per centum for amortization also, to carry out the proposal that passengers should have the right to transportation without change of cars and for a single fare not exceeding 5 cents for one continuous trip over the railroad and connecting lines. A clause identical with the one above quoted from contract No. 1 prescribed a 5-cent fare; another provision obligated the city to purchase the equipment when the lease terminated.

For the construction of this extension the city paid out $6,600,000.

Under Contracts 1 and 2 ways extending over approximately 24 miles (75 of single track) were constructed and then equipped. The longest possible continuous trip by a passenger was 17.4 miles. For equipping them the lessee claims a capital investment of $60,000,000—but large items are questioned and the true sum may be less than $40,000,000. This equipment, with real estate valued at $300,000 and office sundries, is all the property connected with the subways which the Interborough now owns. The lines were opened for traffic October 27, 1904, and prior to 1919 their operation yielded annually large net profits.

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[3] These and similarly stated figures are intended only to give a fair idea of the problems presented—they do not indicate adjudication of any disputed question.

The Court below thought that unless modified by contract No. 3 (*infra*), Contracts Nos. 1 and 2 established an inflexible 5-cent fare and this view has not been seriously questioned here.

In order to meet the insistent demand for quick transportation after prolonged negotiations, the Public Service Commission, acting for the city with approval of the Board of Estimate (being specially authorized by the Rapid Transit Act as amended in 1912), entered into elaborate separate but related agreements (dated March 19, 1913) with the Interborough and Manhattan companies for (1) the construction and operation of extensions to the old lines and certain new subways—"contract No. 3" (2) a third track on the elevated lines—"third track certificate;" (3) extensions to the elevated lines—"extension certificate;" (4) for operation of elevated trains over designated portions of the new subways—"supplementary agreement."

Contract No. 3—122 printed pages—with great detail provided for immediate (and possible future) extensions of and additions to the subway system then existing, also their equipment and operation until the end of 1967. Under it the following lines were constructed, equipped and put into operation.* (1) From the end of old subway in Brooklyn eastwardly with two branches —9 miles. (2) From Borough Hall, Brooklyn, northwesterly under East river and lower Manhattan to Seventh avenue and thence north to Forty-second street (Times Square)—6 miles. (3) The Queensboro Bridge line from Times Square eastward under Forty-second street, through Steinway Tunnel, under East river to Queensboro Bridge Plaza and beyond—12 miles. (4) From Grand Central Station northward along Lexington avenue, under the Harlem and beyond with two branches—18 miles. (5) An Extension of West Farms branch northward—5 miles.

Fifty miles of subways were thus added to the original system —146.8 miles of single track. The longest distance between terminals became 26.78 miles. For the construction of these additions and extensions the city expended from its own treasury

* These new lines in Brooklyn, Queens and the Bronx are mostly above ground.

$113,000,000 and the Interborough Company advanced $58,000,000. For equipment the latter paid not above $62,000,000. Title to both road and equipment vested in the city and both were let to the Interborough Company until December 31, 1967, for operation in conjunction with the older subways. The lessee owns none of the equipment provided under this contract and is not obligated thereby to pay anything to the city as rental for the ways; but it did agree to make certain payments out of the earnings after named deductions are satisfied. The leases under contracts 1 and 2 were adjusted to expire with 1967.

The following provisions of "contract No. 3" are of special importance here:

"Article 1. The city and the lessee further agree upon the modification of contract No. 1 and contract No. 2 in the respects herein set forth, but nothing in this contract shall be construed as a modification or waiver of any of the rights or obligations of the respective parties under contract No. 1 and contract No. 2, except in the respect and to the extent herein specifically set forth. (Certain modifications of Nos. 1 and 2 are specified, but the 5-cent fare provisions are not mentioned).

"Article 3. This contract is made pursuant to the Rapid Transit Act which is to be deemed a part hereof as if incorporated herein.

"Article XLIX. The gross receipts from whatever source derived directly or indirectly by the lessee or on the behalf in any manner from out of or in connection with the operation of the railroad and the existing railroads (old subways), (hereinafter referred to as the 'Revenue'), shall be combined during the term of this contract and the city shall receive for the use of the railroad at the intervals provided a specified part of proportion of the income, earnings, or profits of the railroad and the existing railroads." (Broadly speaking, the part payable to the city is to be ascertained as follows: The Interborough Company shall deduct and retain each year sums sufficient to pay rentals on old lines required by contracts 1 and 2 (say $3,000,000), taxes, operating expenses, maintenance, depreciation; $6,335,000, the esti-

mated average profit derived during the years 1911–1912 from operation of the old lines under contracts 1 and 2; 6 per cent on $80,000,000 advanced for construction and paid for original equipment under contract No. 3; interest on other cost of equipment. These are cumulative. Thereafter the city shall receive 8.76 per cent on the cost of construction paid out under contract No. 3. The remainder will be equally divided between the city and the Interborough).

"Article LIV. The payment of the rental (to city) for the existing railroads referred to in paragraph 1 (A) of Article XLIX shall be made as provided in contract No. 1 and contract No. 2 for the full term of such contracts as herein modified."

"Article LIX. The lessee shall operate the railroad (to be constructed) and the existing railroads (those constructed under contracts 1 and 2) as one complete system and shall furnish with respect thereto such service and facilities as shall be safe and adequate and in all respects just and reasonable. Free transfers shall be given, as required by the Commission, so as to afford a continuous trip in the same general direction for a single fare."

"Article LXII. The lessee shall during the term of the contract be entitled to charge for a single fare upon the railroad (to be constructed) and the existing railroads the sum of 5 cents, but not more."

"Article LXXVIII. Upon giving one-year's notice in writing to the lessee, the city, acting by the Commission, with the approval of the Board of Estimate, may terminate this contract as to all of the railroad (to be constructed) (including extensions and additions) at any time after the expiration of ten years from the date when operation of any part of the railroad shall actually begin; or the city, acting by the Commission, upon like notice and with like approval, may terminate (certain specified) portions thereof." [In the event of such termination, the city agreed to pay the lessee a varying per centum (never above 115 per cent) of amounts contributed toward cost of construction or for equipment.]

The "third track certificate" authorized the Manhattan Railway Company (owner of original elevated lines), subject to definitely prescribed conditions, terms and requirements, to lay

third tracks on the Second, Third, and Ninth avenue lines for accommodation of express trains.

The "extension certificate" authorized the Interborough Company to construct and operate four defined connections between the old elevated and the new subway lines. It carefully specified conditions intended to insure uninterrupted operation and protect the parties and contained the following clause: "The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the railroads (including the parts of the Municipal Railroad over which the Interborough Company is provided with trackage rights as in this certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railroad Company bearing even date herewith) and the Manhattan Railroad the sum of 5 cents but not more."

There is also a provision for terminating the right to operate elevated trains over the extensions and additions and for taking them by the city upon payment of varying percentages of their cost, never exceeding 115 per cent.

These extensions and connections rendered possible the operation of trains far beyond the original extremities of the old elevated lines over roads in the boroughs of Queens and the Bronx belonging to the city.

By the "supplementary agreement," the city granted to the Interborough Company the right to use certain parts of subways constructed under contract No. 3 in connection with the elevated railroads extended as above shown and reserved as possible compensation a named per centum of any increased receipts.

January 1, 1919, all the lines, both elevated and subway, were constructed, equipped, and in operation with uniform 5-cent fare. The record indicates that when this suit was begun the city had extended from its own treasury for construction of subway $180,000,000; that the Interborough Company had advanced for such construction $58,000,000, and had expended for equipment not above $120,000,000—probably much less. The cost to the Interborough for laying third tracks on the elevated lines and building extensions thereto was $44,000,000. The original cost of the old

elevated lines is not disclosed and perhaps cannot be definitely ascertained; it did not exceed $90,000,000. Expenditures under contract No. 3 greatly exceeded estimates; and the cost of operation has been much higher. The present values of the above-mentioned properties is very large, but to determine this with fair accuracy would be exceedingly difficult.

The following excerpts from an affidavit offered by the city are enlightening. The record supports the facts and figures used so far here important; also in general the stated conclusions.

"The operation under contract No. 3 has been highly profitable to the Interborough, as was the prior operation under contracts Nos. 1 and 2. For the year ended June 30, 1926, the Interborough realized from the subway operation a net surplus of $6,569,573.03, after the payment of all operating expenses, taxes, interest, and other fixed charges, including the rentals of $2,655,186.26 to the city under contracts Nos. 1 and 2. The surplus is the amount available for the payment of dividends upon the capital stock of the company so far as subway operation by itself is concerned. The amount of total capital stock outstanding is $35,000,000. The subway earnings alone, therefore, under contract No. 3, provide for dividend payments of over 18 per cent on the par value of the stock.

For 1927 the surplus amounted to $6,380,017.34. (The decline was due to a strike).

"For the current fiscal year ended June 30, 1928, the figures for the first six months are available and show a net surplus amounting to $3,687,000, which exceeds the surplus for the corresponding six months of the fiscal year before by $1,609,000.

"These earnings are, of course, enormous and leave no room for claim that the 5-cent fare fixed by contract No. 3 is inadequate to give a fair return upon the investment of the company in the subway properties, or that the 5-cent fare is without due regard of the rights of the company under the contract.

"The financial difficulties of the Interborough during the past eight years have been due to the Elevated lease from the Manhattan Railroad Company, and not to the subway contract with the city. The terms of the Elevated lease provide that the Interborough must pay as rental the interest upon the Manhattan Rail-

way Company bonds outstanding and dividends after an initial period, at 7 per cent upon the capital stock. The dividend rate, however, was adjusted in 1922 so that the Interborough is now paying 5 per cent upon about 94 per cent of the capital stock, only if and as earned by the Interborough, and 7 per cent upon the minority interest. The Manhattan Railway Company bonds outstanding amount to about $45,000,000 and the capital stock to $60,000,000. . . . In 1927, the interest payments on bonds amounted to $1,808,240 and the dividends on the stock to $3,086,756. In addition to those amounts, however, the Interborough must pay also interest and sinking-fund charges on its own bonds and notes issued for the third tracking, the extension of the elevator lines, and other improvements. The total fixed charges resting on the elevated division, including the dividend rentals, amounted for the year ended June 30th to $8,062,274.85. The income above operating expenses and taxes available for these charges, was only $3,936,396.50. The net revenues from the elevated fell short of earning all charges, including the dividends to the Manhattan Railway stockholders, by $4,125,878.35. For the year ended June 30, 1927, the corresponding shortage amounted to $4,909,129.66.

The elevated and subway operations have been kept financially distinct. The revenues, expenses, taxes, and fixed charges have been segregated, so that each system has had its own financial set-up under the contract controlling its operation.

Notwithstanding the extreme crowding which has existed for several years on the trunk subway lines, the number of passengers has increased steadily upon the subways, while on the elevated it has been decreasing. Since 1920 the transportation revenue (on subways) at a 5-cent fare has increased from $29,300,000 to $40,731,000 in 1927. For the first six months of the current fiscal year, the subway revenue was $21,433,000, compared with $18,647,000 for the same six months the year before; the growth is still continuing unimpeded.

On the elevated lines the total transportation revenues in 1920 amounted to $18,450,000 and for the year ended June 30, 1927, to $17,951,000. During the first six months of the current fiscal year the elevated transportation revenues were $8,874,000, com-

pared with $9,098,000 for the same six months the year before. The decline has not stopped."

In 1891 the legislature of New York enacted what is known as the "Rapid Transit Act" to "provide for rapid transit railways in cities of over one million inhabitants," intended to meet the special needs of New York city, the only municipality with so large a population. It has been amended some forty times. Originally no provision permitted construction of railways at public expense—only privately owned lines were contemplated. A Board of Rapid Transit Railroad Commissioners with general supervisory powers over the construction and operation of rapid transit lines was authorized and given authority to contract concerning fares; also to issue "extension certificates" upon such terms, conditions, and requirements as might appear just and proper. In 1894 an amendment directed that the question whether the city should construct rapid transit facilities at its own expense be submitted to the voters, and further provided:

"In case it shall be determined by vote of the people, as provided by §§ 12 and 13 of this act, to construct by and at the city's expense, then, and in that event, the road or roads so constructed shall be and remain the absolute property of the city so constructing it or them and shall be and be deemed to be a part of the public streets and highways of said city, to be used and enjoyed by the public upon the payment of such fares and tolls and subject to such reasonable regulations as may be imposed and provided for by the Board of Rapid Transit Railway Commissioners.

"The said Board for and on behalf of said city shall enter into a contract with any person, firm, or corporation which in the opinion of said Board shall be best qualified to fulfill and carry out said contract for the construction of such road or roads.

"Such contract shall also provide that the person, firm or corporation so contracting to construct said road or roads shall, at his or its own cost and expense, equip, maintain, and operate said roads for a term of years to be specified in said contract not less than thirty-five nor more than fifty years and upon such terms and conditions as to the rates of fare to be charged and the character of service to be furnished and otherwise as said Board shall

deem to be best suited to the public interests and subject to such public supervision and to such conditions, regulations, and requirements as may be determined upon by said Board."

The voters approved the proposal. On Feb. 21, 1900, and July 21, 1902, contracts Nos. 1 and 2 were executed, and the lines therein specified were constructed and put into operation.

In 1906 the Rapid Transit Act was so amended as to require approval by the Board of Estimate and Apportionment of all contracts for construction, equipment, maintenance, or operation of rapid transit railways built at public expense. Another amendment (Chap. 498, Laws of 1909) authorized the termination of operating contracts and the taking by the city of the equipment upon payment of cost and not exceeding 15 per cent. In 1912 as specially requested by the Board of Estimate and with full knowledge of the circumstances the legislature enacted the Wagner bill, which amended the Rapid Transit Act so as definitely to authorize the contracts and certificates, finally signed March 19, 1913, and above described, whose provisions, after long negotiations, had been tentatively agreed upon prior to the amendment. (Admiral Realty Co. v. New York, 206 N. Y. 110, 99 N. E. 241).

Concerning extension certificates § 24 of the amended act declares: "4. The certificate or certificates prepared by the Commission as aforesaid when delivered and accepted by such person, firm, or corporation shall be deemed to constitute a contract between the said city and said person, firm, or corporation according to the terms of the said certificate; and such contract shall be enforceable by the Commission acting in the name of and in behalf of the said city or by the said person, firm, or corporation according to the terms thereof, but subject to the provisions of this act."

The Public Service Commission Law entitled "an act to establish the Public Service Commissions and prescribing their powers and duties, and to provide for the regulation and control of certain public service corporations and making an appropriation therefor" (Chap. 429, Laws of 1907), became effective July 1, 1907. It authorized appointment of two Commissions and directed: "The jurisdiction, supervision, powers, and duties of

the Public Service Commission in the First District (New York city) shall extend under this act: 1. To railroads and street railroads lying exclusively within that district, and to the persons or corporations owning, leasing, operating, or controlling the same."

This is a general law relative to regulations and control of public utilities throughout the state. It contains no words purporting to amend or modify the Rapid Transit Act except: Those abolishing the Board of Rapid Transit Railroad Commissioners and directing that in addition to other duties. ". . . The Commission in the First District shall have and exercise all the powers heretofore conferred upon the Board of Rapid Transit Railroad Commissioners under Chap. 4 of the Laws of 1891 entitled 'An act to provide for rapid transit railways in cities of over 1,000,000 inhabitants, and the acts amendatory thereto;' and, "All the powers and duties of such Board shall thereupon be exercised and performed by the Public Service Commission of the First District." Among other things it provides:

"Sec. 26.—Safe and adequate service; just and reasonable charges.—Every corporation, person, or common carrier performing a service designated in the preceding section (railroads, street railroads, and common carriers) shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such corporation, person, or common carrier for the transportation of passengers, freight, or property or for any service rendered or to be rendered in connection therewith, as defined in § 2 of this act shall be just and reasonable and not more than allowed by law or by order of the Commission having jurisdiction and made as authorized by this act.

"Sec. 28.—Every common carrier shall file with the Commission having jurisdiction and shall print and keep open to public inspection schedules showing the rates, fares, and charges for the transportation of passengers and property.

"Sec. 29.—Unless the Commission otherwise orders no change shall be made in any rate, fare, or charge or joint rate, fare, or charge, which shall have been filed and published by a common

carrier in compliance with the requirements of this chapter, except after thirty days' notice to the Commission and publication for thirty days. The Commission, for good cause shown, may allow changes in rates without requiring the thirty days' notice and publication herein provided for,—whenever there shall be filed with the Commission by any common carrier as defined in this act any schedule stating a new individual or joint rate, fare or charge—the Commission shall have and it is hereby given authority,—upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, fare, classification, regulation, or practice; and pending such hearing and decision thereon, the Commission upon filing with such schedule, and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule.

"Sec. 49. 1—Whenever either Commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares, or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation,—or that the maximum rates, fares, or charges, chargeable by any such common carrier railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the Commission shall . . . determine the just and reasonable rates, fares, and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed notwithstanding that a higher rate, fare, or charge has been heretofore authorized by general or special statute and shall fix the same by order."

No provision of the Rapid Transit Act subjects it to the Public Service Commission Law. An amendment to the Railroad Law (Chap. 481, Laws 1910) does this in respect of that enactment. (Ulster & D. R. Co. v. Public Service Commission, 171 App. Div. 607, P.U.R.1916E, 243, 156 N. Y. Supp. 1065).

May 28, 1920, the Interborough Company purporting to proceed under § 49, Public Service Law, complained to the Commission that the 5-cent fare on the subways was insufficient and asked a higher one. The petition was denied "for want of jurisdiction

to determine and fix a rate of fare different from that fixed by contract No. 3." A proceeding begun in a state court to annul this order was discontinued before final hearing. Another application, March, 1922, for increased fares upon both elevated and subway lines was likewise denied for lack of jurisdiction. No review was sought. In 1925 the Interborough memorialized the Governor and legislature, set out the result of operations under the 5-cent fare the refusal of the Commission to grant any increase and asked relief. No action was taken upon this application.

February 1, 1928, the Interborough Company, adopting the method prescribed by § 29, Public Service Law, filed with the Transit Commission new schedules which purported to establish, effective March 3, 1928, a 7-cent fare upon all its lines and requested permission to put them into effect on five days' notice. Prior to February 14, 1928, the Commission took no official action. But it appeared that counsel for the Commission and the Mayor expressed the opinion that no relief should or would be granted and perhaps used some threatening and ill-advised language. Also that the members of the Commission had concluded no relief could be granted and that proceedings should be begun at once in a state court to enforce observance of the contract rate.

At 9:20 A. M., February 14, 1928, the original bill before us was filed. It alleged the 5-cent rate had become confiscatory, that the Commission had failed to grant relief and asked an injunction against any attempt to enforce it; also against any interference with the establishment of a 7-cent fare.

Later during the same morning the Transit Commission entered an order which denied its authority to grant any new rate and rejected the new schedules. It further directed counsel to institute suits in the state court to prevent threatened violation of law by the Interborough Company through failure to observe the contract rate. Thereupon being already prepared, three proceedings were begun.

On March 3, 1928, the Interborough Company filed a supplemental bill reciting the action taken by the Commission subsequent to the filing of the original bill, renewed the prayer for re-

lief by injunction and especially asked that further prosecution of the proceedings in the state court be forbidden.

Voluminous affidavits were submitted by both sides and upon these and the pleadings the District Court, three judges sitting, heard the cause and authorized the Interborough injunction described above.

Considering the entire record we think the challenged order was improvident and beyond the proper discretion of the Court.

The record is voluminous; the contracts between the parties are complex; the relevant statutes intricate. No decision of this court or any court of New York authoritatively determines the questions at issue. The basic one calls for construction of complicated state legislation.

[1, 2] To support the action of the court below, it would be necessary to show with fair certainty, first, that before the original bill was filed the Commission had taken, or was about to take, some improper action in respect of the Interborough Company's new schedules or its application for leave to discontinue the 5-cent rate and establish one of 7 cents; and, secondly, that the 5-cent fare was so low as to be confiscatory while the proposed charge of 7 cents was reasonable. We think neither of these things adequately appears from the record.

At most, prior to the original bill, the Commission's members had accepted the view that it lacked jurisdiction to permit a new rate because the existing one was irrevocably fixed by lawful contracts and had determined promptly to seek enforcement of the city's supposed rights by proceedings in the state courts. This was neither arbitrary nor unreasonable. No ground existed for anticipating undue delay or hardship. The purpose of the Commission was in entire accord with rulings announced as early as 1920 and seemingly no longer controverted when in 1925 the Interborough applied for legislative relief. There had been abundant opportunity to test the point of law by appeal to the state courts.

[3, 4] The power of the city to enter into contracts numbers 1 and 2 was affirmed in Sun Printing & Publishing Asso. v. New York, 152 N. Y. 257, 46 N. E. 499; likewise the validity of contract number 3 was declared in Admiral Realty Co. v. New

York, 206 N. Y. 110, 99 N. E. 241. These cases point out that the object of those contracts was to secure the operation of railways properly declared by statute to be parts of the public streets and highways and the absolute property of the city.

The statute under which the Interborough undertook to proceed gave thirty days after filing of the new schedules during which the Commission might take action. The effect of the contracts, long the subject of serious disputation, depended upon the proper construction of state statutes—a matter primarily for determination by the local courts. The members of the Commission intended to take official action appropriate to the circumstances, and neither what they did nor what they intended to do gave any adequate cause for complaint. Alleged newspaper stories and unbecoming declarations by counsel or city officials cannot be regarded here as of grave importance.

[5] Under the doctrine approved in Prentis v. Atlantic Coast Line R. Co. 211 U. S. 210, 231, 53 L. ed. 150, 29 Sup. Ct. Rep. 67, and Henderson Water Co. v. Corporation Commission, 269 U. S. 278, 70 L. ed. 273, P.U.R.1926B, 666, 46 Sup. Ct. Rep. 112, the Interborough Company could not have resorted to a Federal Court without first applying to the Commission as prescribed by the statute. And having made such an application it could not defeat orderly action by alleging an intent to deny the relief sought.

[6] Both the bill of complaint and the argument of counsel here proceed upon the theory that under the law of New York as clearly interpreted by definite rulings of her courts, the contracts for operating the transit lines impose no inflexible rate of fare. With this postulate we cannot agree. People ex rel. New York v. Nixon, 229 N. Y. 356, P.U.R.1920F, 1008, 1013, 128 N. E. 245, decided July 7, 1920, is especially relied upon: but the circumstances there were radically different from those now presented. The effect of a contract with the city, expressly authorized by amendment to the Rapid Transit Act adopted subsequent to enactment of the Public Service Commission Law, was not involved. The court carefully limited its opinion, and it said: "The conditions of other franchises may supply elements of distinction which cannot be foreseen. Contracts made after

the passage of the statute (Consol. Laws, Chap. 48) (Public Service Commission Law) may conceivably be so related to earlier contracts either by words of reference or otherwise, as to be subject to the same restrictions. We express no opinion upon these and like questions. They are mentioned only to exclude them from the scope of our decision. In deciding this case, we put our ruling upon the single ground that the franchise contract of October, 1912, was subject to the statute and by the statute may now be changed."

Counsel for appellants refer with confidence to Parker v. Elmira, C. & N. R. Co. 165 N. Y. 274, 59 N. E. 81; Fort Edward v. Hudson Valley R. Co. 192 N. Y. 139, 84 N. E. 962; Quinby v. Public Service Commission, 223 N. Y. 244, P.U.R. 1918D, 30, 119 N. E. 433, 3 A.L.R. 685; People ex rel. Garrison v. Nixon, 229 N. Y. 575, 645, P.U.R.1921A, 27, 128 N. E. 255; New York v. Brooklyn City R. Co. 232 N. Y. 463, 134 N. E. 533.

[7] Although both the elevated and subway lines are operated by the same company the two systems have been treated as separate and upon this record must be regarded. The receipts from the subways show steady increase. If this continues the Interborough Company ultimately will receive its entire investment on account of subways with large profits. The elevated road, the present value of which for rate-making purposes is said to be above $150,000,000, are not prospering. Their net receipts are diminishing. Appellees seek a 7-cent fare for all lines based upon alleged present values and the requirements of a supposed unified system.

The claim for an 8 per cent return upon the values of subways, which are the property of the city and distinctly declared by statute to be public streets (Sun Printing & Publishing Asso. v. New York, *supra*) is unprecedented and ought not to be accepted without more cogent support than the present record discloses. The operating equipment supplied under contracts No. 1 and 2, which originally cost not over $60,000,000 and real estate valued at $300,000 and office sundries of small value, is the only property connected with the subways to which the Interborough holds title, but it seems remuneration based upon total values of all

these ways and their equipment said to represent investments amounting to $360,000,000 and present value exceeding $600,000,000. At the current rate of return, after paying operating expenses, taxes, and rentals to the city, the Interborough will realize annually from the subways more than $17,000,000. The annual income of the elevated lines, after deducting operating expenses, maintenance, taxes &c., probably will not hereafter exceed $4,000,000 and as the Interborough must pay rentals, therefore, amounting to $4,900,000, also interest on bonds, notes, &c. (issued for third tracks, extensions, etc.) in excess of $3,000,000, its loss by reason of this lease is heavy and apparently will increase.

During 1927 passengers carried on the subway lines numbered 814,600,000, on the elevated 359,000,000, total 1,173,600,000. An increase of 2 cents upon each fare would have added to the subway receipts $16,292,000, to the elevated $7,180,000.

[**8–10**] The Transit Commission has long held the view that it lacks power to change the 5-cent rate established by contract, and it intended to test this point of law by an immediate, orderly appeal to the courts of the state. This purpose should not be thwarted by an injunction. Upon the record before us we cannot accept the theory that the subways and elevated roads constitute a unified system for rate-making purposes. Considering the probable fair value of the subways and the current receipts therefrom, no adequate basis is shown for claiming that the 5-cent rate is now confiscatory in respect of them. The action below was based upon supposed values and requirements of all lines operated by the Interborough Company treated as a unit and the effort to support it here proceeds upon a like assumption.

The interlocutory order must be reversed. The cause will be remanded to the District Court for further proceedings in conformity with this opinion.

P.U.R.1929B.

MICHIGAN SUPREME COURT.

PEOPLE EX REL. WILLIAM W. POTTER, ATTORNEY GENERAL

v.

MICHIGAN BELL TELEPHONE COMPANY.

[No. 177.]

(— Mich. —, — N. W. —.)

Intercorporate relations — Domination of holding company — Subsidiary as operating unit.

1. A state-wide telephone company owned to the extent of 99.99 per cent of its stock by a nation-wide corporation was held to be merely an operating unit of the holding company, where there was evidence of its being operated under the centralized administration of the parent company, p. 457.

Corporations — Organization under statutes — Outside management.

2. Statutory provisions under which a corporation has been organized to render telephone service under the management of its directors are violated when the corporation becomes a mere operating unit of a holding company, p. 457.

Intercorporate relations — Disregard of corporate entity.

3. The separate entities of a subsidiary corporation and a holding corporation will be disregarded without regard to actual fraud and the two companies will be regarded as one unit, when the subsidiary is so organized and controlled as to make it a mere instrumentality, agent, or adjunct of the parent company to evade legal obligations, p. 460.

Return — Operating expenses — Payment to parent company under contract — Absence of separate corporate entity.

4. A contract calling for payments to a parent company for services rendered to a subsidiary which is regarded as a mere operating unit and not as a separate corporate entity is not binding, p. 460.

Corporations — Ouster from franchise — Relief as to particular act — Payments to parent companies.

5. A judgment ousting a telephone company of the right to have credit in the computation of rates for payments to a parent company under and as upon a contract may be entered, instead of a general judgment of ouster, in a *quo warranto* proceeding, where it is shown that the contract is not binding because the subsidiary is not operated as a separate entity in accordance with statutory provisions, p. 461.

(FELLOWS, J., dissents.)

[March 29, 1929.]

QUO WARRANTO proceeding to oust a telephone company of its franchise; judgment of ouster to do a particular act entered.

P.U.R.1929B.

Before Fead, C. J., North, Fellows, Wiest, Clark, McDonald, Sharpe, JJ.

Clark, J.: This is an information in the nature of *quo warranto,* filed by the people of the state of Michigan on relation of Andrew B. Dougherty, then attorney general, to oust the Michigan Bell Telephone Company, a Michigan corporation, of its franchise. After plea and replication evidence was adduced upon the following, stipulated by counsel to be the issue:

"Whether the defendant exercises its corporate franchises and conducts its business, or such substantial part thereof as to warrant judgment of ouster, subject to the domination and in accordance with and in submission to the dictation of the American Telephone & Telegraph Company, or instead of itself conducting such business permits said American Telephone & Telegraph Company to conduct it, so that the said defendant is merely the instrumentality and form by and under which said American Telephone & Telegraph Company itself conducts such telephone business in the state of Michigan, and said defendant thereby has misused and abandoned its franchises and should, therefore, by the judgment of this court be ousted from its corporate rights, privileges, and franchises."

As briefed and submitted for decision the controversy is reduced, quoting the concluding paragraph of the main brief of the attorney general:

"It is respectfully submitted that this court render a judgment of ouster, unless within a reasonable time the telephone company makes adequate provisions to insure the rendition of the license contract services at no more than a reasonable rate over which the Public Utilities Commission shall be accorded supervision."

From this and the other briefs it appears that this suit is an attack on the so-called 4½ per cent (later 4 per cent) contract. As gathered from the briefs, the contention of plaintiff is that the services rendered by the American Telephone & Telegraph Company, a corporation, hereinafter called American Company, under the so-called license or 4 per cent contract with the Michigan Bell Telephone Company, hereinafter called Michigan Company, is an essential part of the telephone business; that such

services purporting to be rendered under contract are not in fact so rendered; that the American Company, through ownership of nearly all the capital stock of the Michigan Company, and through domination, is itself conducting business in the state; that such domination and the surrender by the Michigan company of its telephone business constitute an abuse of the franchise which, unless corrected, warrants forfeiture. The defendant contends that the services rendered under the contract are very valuable, easily worth the 4 per cent of gross revenue paid therefor, that it exercised a proper business discretion in making the contract, and that it is entitled in fixing a rate to credit for the full amount paid pursuant to the contract, to which plaintiff replies that the contract is pretended, due to domination of the American Company, in effect made by it with itself, that it does the business in Michigan, and that the Public Utilities Commission of the state, in fixing a rate, is entitled to have in evidence the American Company's actual cost of the services rendered. Apparently, the plaintiff's position is that the cost to the American Company of these services, rather than the cost thereof to the Michigan Company under the contract, should be the amount of this item considered in rate making.

It is recognized that we have here two corporate entities. Fraud is expressly disclaimed. We are asked to disregard the "corporate fiction," the "entity theory," and to look to the substance on the ground that "the forms of corporate organization are used to accomplish a violation of law or a result contrary to public policy."

[1, 2] The information avers, and the plea admits, that the Michigan Company was organized and exists under the provisions of Chap. 169, 2 Compiled Laws 1915, being Act No. 129, Public Acts 1883. Section 4 of the act gives the Company, among other things, the power "to conduct and carry on the business of providing and supervising communication by telephone." Section 2 of the act provides: "The stock, property, and affairs of every corporation organized hereunder shall be managed by its directors." The record is convincing that these provisions are not being observed, but are being violated to the injury of the public. The Michigan Company is not conducting and carrying on tele-

phone business in Michigan; the American Company is doing it. The board of directors of the Michigan Company does not manage the property and affairs of the Company; that is done by the American Company. The American Company owns 99.99 per cent of the common stock of the Michigan Company. Nearly 70 shares are held by certain directors. We quote from a brief:

"In 1911 five great companies, of which the Michigan Company was one, operated with one president for all, practically an identical set of directors, and a single general manager. Comprised in this central group of Bell Telephone Companies were, besides the Michigan Company, the Chicago Telephone Company, the Cleveland Telephone Company, the Wisconsin Telephone Company, and the Central Union Telephone Company. Nothing in the minutes of the Michigan Company evidences that arrangement. On April 11, 1911, Mr. Sunny was elected president of the Michigan Company (he was at that time president of four other companies); and on the same date the board of directors on motion of Mr. Kingsbury, a vice-president of the American Telephone & Telegraph Co. unanimously appointed H. F. Hill general manager. He was likewise manager of the four other companies.

"In passing we direct attention to the fact that every resolution of the board of directors,—the evidence extends from 1911 to date,—was unanimously passed. It is significant that no division of opinion ever appears either in respect to policy or persons nominated.

"This arrangement—the group organization—persisted from 1911 to 1920, when it was terminated in accordance with the view of the American Telephone & Telegraph Company. At the meeting of the board of directors, January 30, 1920, the chairman explained the growth of the companies comprising the group and the view of the American Telephone & Telegraph Company as follows,—

" 'Since the time of the organization, State Utility Commissions have been organized in the several states, and rate cases in behalf of some companies have had to be conducted under the auspices of the Chicago headquarters, which, with respect to states other than Illinois, was somewhat objectionable. Under

control of State Utilities Commissions home companies seemed to be in more favorable position than companies managed from other states. It is now the view of the American Telephone & Telegraph Company that on account of the very large growth of the several properties, the regulation of rates by the State Utilities Commissions, and because of other considerations, the group idea does not lend itself to the best interests of the respective companies. Therefore, it is proposed to officer the Michigan State Telephone Company on a state basis and separate it from the central group.' "

The Michigan Company (then Michigan State, now Michigan Bell) was separated and "officered" accordingly.

Witnesses, officers of both the Michigan and the American Company, testified of conclusion that there was no domination of the Michigan Company. The record does not support the conclusion. An annual report of the American Company states that "an effective common control over all" associated companies was necessary, and that the units "will be closely associated under the control of one central organization exercising all the function of centralized general administration."

Again:

" 'Administration' is centralized, it is legislative, determinative of general subjects, supervisory and judicial, acts alike for all branches and divisions and may be located apart from the seats of action.

" 'Operation' is executive. It is the action, the operation supreme as to local questions but responsible to the central administration. It may be separated into divisions or departments each having operating relations with the other but no lines of authority between them.

"In the Bell System the 'administration' is in the American Telephone & Telegraph Company, the central company. The 'operation' is in the Associated Companies, each operating on defined lines in distinct territory, each in fact an operating division and no more."

A review of all the evidence is convincing that in the Bell System the Michigan Company is merely an operating unit, "operating on defined lines," and the lines, to achieve standardization

in method, practice, materials, and equipment, are most minutely defined and are as minutely followed.

The Michigan Company is no more engaged in conducting and carrying on a telephone business than is the ordinary station agent engaged in conducting and carrying on the railroad business of his employer. The agent must use reason and intelligence, and has a certain discretion, but it would be remarkable were his "lines" as closely defined as are those of the Michigan Company. The admitted purpose of having in this state a separate corporate entity has been stated and quoted.

[3] Where a corporation is so organized and controlled and its affairs so conducted as to make it a mere instrumentality or agent or adjunct of another corporation, its separate existence as a distinct corporate entity will be ignored and the two corporations will be regarded in legal contemplation as one unit. In Re Muncie Pulp Co. 71 C. C. A. 530, 139 Fed. 546; Interstate Teleg. Co. v. Baltimore & O. Teleg. Co. 51 Fed. 49; Wormser on Disregard of the Corp. Fiction, 54. When a corporation exists as a device to evade legal obligations, the courts without regard to actual fraud will disregard the entity theory. Higgins v. California Petroleum & Asphalt Co. 147 Cal. 363, 81 Pac. 1070; Brundred v. Rice, 49 Ohio St. 640, 32 N. E. 169; Donovan v. Purtell, 216 Ill. 629, 75 N. E. 334.

[4] That the Michigan Company is a mere agent or instrumentality of the American Company is established. We think that it is also apparent that a purpose of the separate entity is to avoid full investigation and control by the Public Utilities Commission of the state to the injury of the public. The difference in entity going out, the contract goes with it. The American Company cannot contract with itself.

It is urged that there is former adjudication by reason of Detroit v. Railroad Commission, 209 Mich. 395, P.U.R.1920D, 867, 177 N. W. 306, and Michigan Pub. Utilities Commission v. Michigan State Teleph. Co. 228 Mich. 658, P.U.R.1925C, 158, 200 N. W. 749. Those were rate cases. A basic and necessary concession involved in the very structure of that litigation was that the Michigan Company was conducting and carrying on a telephone business in the state. The purpose of the litigation was

to fix its rates in its business in the state. From such concession it followed that the Michigan Company had capacity and ability to make the contract in question, and the inquiry respecting it was whether, in view of the relations of the companies, the contract was fair. The plaintiff here was not a party in that litigation, and the adjudications there offer no bar to this action to forfeit franchise. 7 Thompson on Corp. (3d Ed.), page 840; 6 C. J. 816; 15 R. C. L. 1029.

[5] Under the statute authorizing this proceeding in *quo warranto* (3 Comp. Laws 1915 (13536), *et seq.*), a general judgment of ouster is not required. Attorney General ex rel. James v. National Cash Register Co. 182 Mich. 99, 148 N. W. 420. It may be "an ouster to do the particular act complained of." The sole relief here sought is of the contract in question, that defendant be ousted of right to have credit in a computation of rates for payments to the American Company under and as upon the contract.

Plaintiff is entitled to the relief. Judgment of ouster will be entered accordingly.

Fellows, J., dissenting: Admittedly the 4½ per cent contract (now 4 per cent) is the sole cause of this litigation. The attorney general, I think, makes it clear in briefs and upon oral argument that he does not desire to paralyze the business of the state by ousting the defendant completely from doing telephone business in the state, and, as I understand the opinion of my brother Clark, the judgment of ouster he says should be entered does not go so far. In other words, the defendant will "be ousted of right to have credit in a computation of rates for payments to the American Company under and as upon the contract." I shall presently consider the propriety of *quo warranto* proceedings to test the validity of the contract and what I shall now say will be upon the theory that the action is an appropriate one for the purpose.

The original 4½ per cent contract between the Michigan Company and the predecessor of the American Telephone & Telegraph Company (the Bell Company) was entered into when that company owned not a share of stock in the Michigan Company

and the business relations between the two companies have been substantially the same after as before the American Company commenced to buy stock in the Michigan Company. The contract was before this court in Detroit v. Michigan R. Commission, 209 Mich. 395, P.U.R.1920D, 867, 177 N. W. 306, and in Michigan Pub. Utilities Commission v. Michigan State Teleph. Co. 228 Mich 658, P.U.R.1925C, 158, 200 N. W. 749, and before the United States Supreme Court in Houston v. Southwestern Bell Teleph. Co. 259 U. S. 318, 66 L. ed. 961, P.U.R.1922D, 793, 42 Sup. Ct. Rep. 486, and Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, 262 U. S. 276, 67 L. ed. 981, P.U.R.1923C, 193, 43 Sup. Ct. Rep. 544, 31 A.L.R. 807. I was disqualified in the Detroit Case (*supra*) and, of course, did not read the record although I was somewhat familiar with the proofs. I did sit in the Michigan Pub. Utilities Commission Case (*supra*) and I then read the record in that case, so far as it pertained to the 4½ per cent contract and the depreciation reserve, and at the same time I read the record in the Houston Case (*supra*) and the record in the Southwestern Bell Case (*supra*) so far as they pertained to these subjects. I have read the voluminous record in the instant case with care and I must confess that upon the question of the 4½ per cent contract, so far as I am able to discover, the records in all the cases are substantially identical and in many instances the same witnesses appear. In all of the decided cases the American Telephone & Telegraph Company owned all or substantially all of the stock of the local company; in all of the cases this fact was stressed and in all of these cases the validity of the 4½ per cent contract was sustained. In each of the decided cases, this result was reached having in mind the rule that agreements between the parent and subsidiary companies must be closely scrutinized, and if procured by domination or unfairly, should be disregarded in a rate-making case. But each case recognized that the men who furnish the money to run a business should have some reasonable say as to its proper expenditures and management; as stated by Mr. Justice McReynolds in the Southwestern Bell Case, *supra*, at p. 200 of P.U.R.1923C:

"It must never be forgotten that while the state may regulate

with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in State P. U. C. ex rel. Springfield v. Springfield Gas & E. Co. 291 Ill. 209, 234, P.U.R.1920C, 640, 125 N. E. 891.

" 'The Commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.' "

I see no reason for reaching a different conclusion in the instant case than that reached in the cases cited.

But forgetting the other cases and taking this record alone, I am satisfied that the state has signally failed to establish domination over the Michigan Company in the offensive or illegal sense by the American Company. The contract which it is claimed was procured by domination is the same in essentials as the earlier contracts made when the American Company and its predecessor had no financial interest in the Michigan Company, and is substantially the same as entered into with companies in which it does not own the controlling stock. Speaking from this record and this record alone, I am satisfied the services performed under this contract are worth every dollar the Michigan Company pays.

Some of us remember the advent of the telephone, the little exchanges which sprung into being with their crude instruments and cruder service. This record discloses the millions upon millions which have been expended by the American Telephone & Telegraph Company in the development and perfection of telephony, the benefit of which and of future developments are and will be available to defendant under the contract assailed. Mr. Jackson who was the first president of the Michigan Company, and its president in 1887 when the first contract was entered into with the Bell Company (predecessor of the American Telephone & Telegraph Company) and who is now retired, testifies:

"Well, generally speaking, I may say that I have considered,

and I do now consider, that the agreement for the use of the Bell instruments, and all that is implied thereby is the greatest asset that the Michigan State Telephone Company has."

While of little moment to this case, it is interesting historically to note that in the instant case the attorney general is insisting that the American Company come into the state and become domesticated at the peril to the defendant of losing its franchise, and in 1909 the then attorney general insisted that the American Company keep out of the state, and this court in American Teleph. & Teleg. Co. v. Secretary of State, 159 Mich. 195, 123 N. W. 568, refused it permission to come into the state and become domesticated. But, of course, times do change.

The remedy by *quo warranto* is an extraordinary remedy. It is resorted to against corporations for violation of the privileges conferred upon them by the state. Complete ouster is not required. In Attorney General ex rel. James v. National Cash Register Co. 182 Mich. 99, 148 N. W. 420, the defendant was assessed the maximum fine and ousted from continuing its illegal practices some of which were set up in the opinion. Here the defendant will not be ousted from continuing any illegal practices, because it is not claimed that it has been guilty of any illegal practices; it will be ousted and only ousted of its right in a rate-making case to have credit by the Michigan Utilities Commission for payments made to the American Company pursuant to the terms of the contract. What testimony shall be received, and what credits shall be given by the Commission in a rate proceeding before that body is, in the first instance, for the determination of the Commission, subject, of course, to judicial review. This court ought not on *quo warranto* oust the defendant or any other corporations from introducing any evidence it sees fit or asserting any rights it may be advised it has in proceedings had before the administrative boards of the state. If the defendant has ceased to function as a corporation of this state and is but a cloak or dummy under which, and through which, the American Company is doing the telephone business of the state (which claim the state, in my judgment, has signally failed to establish), if it is no longer exercising its corporate franchises, it should be ousted *in toto*.

Proceedings in *quo warranto* should not be used to decide for the Commission and in advance of a proceeding before it, what evidence shall and what shall not be considered by it, what claims shall be and what claims shall not be considered by that body, if and when it has occasion to act in the future. Nor should such proceedings be used as a club; nor should this court enter a judgment which may under any circumstance be regarded as only a gesture. In my judgment this proceeding should be dismissed, leaving to the Commission to decide in the first instance, and subject to judicial review, what it will consider and what it will not consider in rate proceedings which may in the future come before it.

Before the entire bench except Potter, J.

MISSOURI PUBLIC SERVICE COMMISSION.

RE MISSOURI NATURAL GAS COMPANY.

[Case No. 6247.]

Service — Gas — British Thermal Units.

Notwithstanding a general order calling for an average heating value of 570 B.T.U., the Commission was of the opinion that a satisfactory gas service could be furnished to the public by using gas containing a heating value of 480 units per cubic foot, but that the lower heating value should also be reflected in rates to be charged in view of the economy of manufacturing gas with a lower standard.

[February 11, 1929.]

APPLICATION of a gas company for a certificate of convenience and necessity to erect, maintain, and operate a gas plant and gas distributing system in certain territory; granted.

By the **Commission:** This case is before the Commission upon the application of the Missouri Natural Gas Company, a Missouri corporation, hereinafter referred to as the applicant, for an order of the Commission granting said applicant a certificate of convenience and necessity to construct, maintain, and operate

a gas plant and distribution system in the city of Poplar Bluff, Missouri, and the subdivisions of said city known as Kellytown and Vinegar Hill, all in Butler county, Missouri.

The application is accompanied by the following exhibits:

Map showing the location of the gas mains which the applicant proposes to construct in and across the streets of said city.

Certified copy of the franchise granted the applicant by the city of Poplar Bluff.

Specifications of the distribution system as herein proposed.

The application shows that the city of Poplar Bluff granted the applicant a franchise for the construction, maintenance, and operation of a gas plant and distribution system in said city on the 6th day of February, 1928, there being no public utility furnishing gas service in that said city.

The applicant's estimate of the cost of the gas plant and distribution systems is $204,462. The application shows that on December 15, 1928, 983 customers had signed for gas service. The estimated gross revenue from the operation of the plant is given as $42,000 per year and the operating expenses as $20,660, leaving $21,340, or a rate of 10.4 per cent for depreciation and return on the investment.

It is noted in the application that the applicant is proposing to construct a gas plant and furnish to the public gas having a heat content of 480 B.T.U., whereas the standard fixed by this Commission in General Order No. 20, calls for an average heating value of 570 B.T.U., unless specifically authorized by the Commission to have a different heating value. It is the opinion of the Commission that satisfactory gas service can be furnished the public by using gas containing a heat value of 480 B.T.U. per cubic foot but the lower heating value should also be reflected in the rates to be charged for that service, the gas with a low heating value being a cheaper gas to manufacture than that of a higher value.

There appears to be no objections to the construction of the proposed plant and distribution systems and the Commission, after considering all the evidence filed herein, finds that the

public convenience and necessity reasonably require the construction, maintenance, and operation of the gas plant and distribution systems as herein proposed.

Ing, Chairman, Calfee, Painter, and Porter, Commissioners, concur; Hutchison, Commissioner, absent.

MARYLAND COURT OF APPEALS.

UNITED RAILWAYS & ELECTRIC COMPANY OF BALTIMORE

v.

HAROLD E. WEST et al.

[No. 71.]

(— Md. —, — Atl. —.)

Return — Confiscation — Percentage allowed — Street railways.

The Commission in limiting a street railway company to a rate schedule which would permit the earning by reasonably efficient management of a return of 6.26 per cent on the total value of its property was held not to have deprived the corporation of its property without due process of law and such rate was held not to be confiscatory.

(PARKE, J., dissents.)

[March 20, 1929.]

APPEAL from decree of Circuit Court No. 2 of Baltimore City refusing to annul rate order of the Public Service Commission affecting a street railway; decree of lower court affirmed.

Offutt, J.: The most important question presented by this appeal is whether the Public Service Commission of Maryland in limiting the United Railways & Electric Company of Baltimore to a rate schedule which permits it to earn by reasonably efficient management a return of 6.26 per cent on the total value of its property deprives it of its property without due process of law.

While that question was considered and decided adversely to appellant's contention in West v. United R. & Electric Co. 155 Md. 572, P.U.R.1928D, 141, P.U.R.1928D, 193, 142 Atl. 870, P.U.R.1929B.

the decree in that case was reversed and the case remanded that the allowance made by the Commission for the annual depreciation of the company's property might be reconsidered and determined in accordance with the views expressed in the opinion.

Subsequent to the remand proceedings were had which resulted in increasing the allowance for depreciation by $755,116, and following that increase the Commission revised the schedule of rates fixed in its order involved in the former appeal, and permitted appellant to charge a base rate of 8¾ cents when tokens were sold, or 10 cents cash, for the transportation of passengers over twelve years of age, as compared with 7½ cents when tokens were sold or 9 cents cash, allowed by its previous order.

Thereupon the appellant filed a supplemental bill in which omitting so much as is merely argumentative or historical it alleges: "As the Commission thus found, all the evidence before the Commission showed, and the fact is, said increase in rate permitted by Order No. 13430 is not more than is required to increase the company's annual return by $755,116, viz., the amount of the increase in annual allowance for depreciation, and the increased rates permitted by Order No. 12639, P.U.R.1928C, 604, as so amended by Order No. 13420, P.U.R.1929A, 180, will yield the company an annual return not more in any event than $4,691,606, the amount which the Commission in its opinion filed February 10, 1928, *supra,* found could reasonably be expected from the rates fixed by Order No. 12639. . . .

The annual return that can be expected by the company from said rates (as increased by Order No. 13420, *supra*) is not more than $4,691,606, and not more than 6.26 per cent on the fair value of the company's property, and an annual return of $4,691,606, or of 6.26 per cent, would be substantially less than a fair return such as the company is entitled under the Constitution of the United States, and also under the Maryland Bill of Rights and the Public Service Commission Law, to be permitted to earn. Said Order No. 12639, *supra,* as so amended by Order No. 13420, *supra,* of the Commission, therefore, and any prior orders of the Commission limiting the company to the same or lower rates, are contrary to the 14th Amendment of the Consti-

tution of the United States and to the Maryland Bill of Rights and the Public Service Commission Law and are null and void, and, so long as they are enforced, deprive the company of its property without due process of law, and said orders and the rates, regulations, practices, acts, and services fixed thereby are unlawful and unreasonable.

"In each and all of the following respects Order No. 12639, *supra* (as amended by Order No. 13420, *supra*), of the Commission, and the Commission's opinion made a part of Order No. 12639, *supra* (as modified by the opinion made a part of Order No. 13420, *supra*), and any prior orders of the Commission limiting the company to the same or lower rates, and the rates, regulations, practices, acts, and services fixed by said orders, or any of them, are unlawful, unreasonable, arbitrary, unsupported by any substantial evidence, contrary to the facts established by substantial evidence, confiscatory and contrary to the 14th Amendment of the Constitution of the United States and to the Maryland Bill of Rights and the Public Service Commission Law and null and void. . . .

"The Commission by said order burdened the company with a substantial loss of revenue by requiring it to abolish the second fare upon its Halethorpe line, which loss, without any compensating offset, and without any lawful reason for abolition of said fares, further diminishes the inadequate return upon the company's property. . . .

"That the action of the Commission in so refusing to allow the company to charge and collect for its service the rates of fare proposed and required by it, limiting it to the rates specified and provided in said opinion and said order of February 10, 1928, *supra,* as modified and amended by said opinion and said order of November 28, 1928, *supra,* and abolishing its second fare on its Halethorpe line is, therefore, not only unreasonable but confiscatory, unlawful and void, and constitutes a taking of the company's property without adequate compensation and without due process of law."

Upon those allegations it prayed:

That the aforesaid Order No. 12639, passed February 10,

1928, P.U.R.1928C, 604, as amended by the aforesaid Order No. 13420, passed November 28, 1928, P.U.R.1929A, 180, of the Public Service Commission of Maryland, the defendants herein, in so far as it purports to limit the rates of the United Railways & Electric Company of Baltimore, the plaintiff herein, so as to prevent the plaintiff from charging a flat rate of 10 cents or from making similar increases in commutation and other special rates or from continuing the first and second fare zones on the Halethorpe line as they existed on February 10, 1928, and any prior orders of the Commission in so far as they purport so to limit the rates of the company, and the rates, regulations, practices, acts, and services fixed by said orders or any of them in so far as they purport to limit the company as aforesaid, be adjudged and decreed to be unlawful, unreasonable, unconstitutional, null and void and be vacated and set aside.

That the defendants, Harold E. West, chairman, and J. Frank Harper and Steuart Purcell, members, constituting the Public Service Commission of Maryland, and their respective successors in office, agents and attorneys, and all persons acting under their authority may be perpetually and also preliminarily pending this suit, restrained and enjoined from enforcing or continuing in force against the plaintiff the aforesaid Order No. 12639, *supra* (as amended by the aforesaid Order No. 13420, *supra*) in so far as it purports to limit the rates of the plaintiff so as to prevent the plaintiff from charging a flat rate of 10 cents or from making similar increases in commutation and other special rates of from continuing the first and second fare zones on the Halethorpe line as they existed on February 10, 1928, or any prior orders of the Commission in so far as they purport so to limit the rates of the company.

The appellee answered the bill stating that "on November 28, 1928, the Commission filed an opinion and passed Order No. 13420, P.U.R.1929A, 180 (of which the opinion was made part), by which opinion it found that $1,638,660 (instead of $883,544 previously allowed) is the proper annual amount to be allowed for depreciation, to conform with the opinion of the court of appeals of Maryland, and increased the company's rate of fare to

10 cents cash, or four tokens for 35 cents, other fares to remain as established by Order No. 12639, P.U.R.1928C, 604. That the increase in fare so allowed by the Commission was intended to furnish only sufficient revenue to supply the increase made in the annual depreciation allowance of the company," admitting that "(1) that the present fair value of the company's property used in the public service is $75,000,000; (2) that the annual return which the Commission estimated would be yielded by the rates fixed in Order No. 12639 was $4,961,606; and that the same would amount to a return of 6.26 per cent on the fair value of the company's property," and denying the allegations of the ninth and tenth paragraphs from which we have quoted.

The case was heard upon those pleadings, and a transcript of the proceedings before the Commission and at the conclusion of the hearing the court refused the injunction prayed and dismissed the bill. The appeal from that decree submits three questions (1) whether a schedule of rates which permits the appellant to earn 6.26 per cent on the fair value of its property is confiscatory, (2) whether any schedule of rates less than that proposed by it, to wit, a flat rate of 10 cents and "similar increases" in commutation and other special rates, is confiscatory, and (3) whether so much of the order of the Commission as consolidates the first and second fare zones on the Halethorpe line as they existed on February 10, 1928, is unlawful.

These several questions were, as we have stated, submitted to this court at an earlier stage of this proceeding, West v. Public Service Commission, *supra*, and as nothing which has transpired since has any direct connection with them, it is unnecessary to repeat or to restate the reasons which led us in that case to decide upon the evidence now as then, before us: (1) That a rate schedule which permitted the company to earn by reasonably efficient management 6.26 per cent on the fair value of its property was not confiscatory, (2) that any schedule of rates less than that proposed by the company, to wit, a flat fare of 10 cents and "similar increases" in commutation and other special rates was not necessarily confiscatory, and (3) that the consolidation of the first and second zones on the Halethorpe line was not unlawful.
P.U.R.1929B.

But it is sufficient to say, that for the reasons given in the opinion filed in that case, we find no error in the decree from which this appeal was taken, and it will, therefore, be affirmed.

Decree affirmed, with costs.

Bond, C. J., while still holding the views expressed in the dissenting opinions filed on the former appeal in this litigation, I take the questions to be closed in this court by the previous decision.

MONTANA PUBLIC SERVICE COMMISSION.

JOHN SCONFIENZA et al.

v.

BUTTE ELECTRIC RAILWAY COMPANY.

[Docket No. 1023, Report & Order No. 1531.]

Commissions — Jurisdiction — Acts of other departments.

1. The Public Service Commission is not invested by law with judicial powers nor is it given the authority to pass upon the validity of acts of other departments in the state, p. 476.

Commissions — Rank of Public Service and Highway Commissions.

2. The State Highway Commission is a co-ordinate legislative agency and, as such, equal in rank, importance, independence, and dignity to other legislative agencies, and there is nothing in the act creating it that makes it subordinate to the Public Service Commission, p. 476.

Commissions — Conflict of powers — Highway and Public Service Commissions.

3. A duty exclusively entrusted to and enjoined upon the Highway Commission involves the performance of an official act by it that no other co-ordinate department such as the Public Service Commission has any lawful authority or inherent power to characterize as invalid or to attempt to lay its coercive hand thereon, p. 476.

Commissions — Presumption in favor of other Commissions.

4. The Public Service Commission is bound by the presumption that the acts of other Commissions, and until such a time as a competent tribunal has declared that such acts are invalid, the Public Service Commission has no authority to enter conflicting orders, p. 476.

[February 13, 1929.]

COMPLAINT against street railway utility seeking an order of

the Commission requiring the utility to extend its tracks; complaint dismissed.

Appearances: James T. Fitzgerald, Attorney, Butte, for the complainants; D. G. Stivers, Attorney, Butte, for the respondent, Butte Electric Railway Company, and Francis A. Silver, Counsel, for the Commission.

By the **Commission:** John Sconfienza and numerous other residents of Meaderville, an unincorporated community, situated approximately one mile to the north and east of the corporate limits of the city of Butte, Silver Bow county, Montana, complain to the Commission against the action of the Butte Electric Railway Company, a public utility engaged in furnishing street railway service to the city of Butte and immediate environs, in removing its terminus to a point approximately 380 feet closer to the corporate limits of the city of Butte. The change in terminus was brought about by the removal of 380 feet of track on Main street, Meaderville. Complainants allege that as a result of the curtailment in trackage facilities, the street railway service is inadequate, insufficient, and results in unjust discrimination against the residents of Meaderville.

The Butte Electric Railway Company (hereinafter termed "utility"), answers the complaint with the admission that it has changed its tracks as alleged; disclaims any "wish or desire to shorten its line as set out in said complaint or to change its track," and pleads affirmatively that the said change in terminus was effected by it in complying with an order of the State Highway Commission of the state of Montana directing it to remove the said 380 feet of track and after securing the consent and approval of this Commission to such removal.

To the affirmative matter in the utility's answer, the complainants by reply "deny that the State Highway Commission of Montana has or had any jurisdiction, right, or authority, to make any legal or valid order or direction, or any order or direction of any legal force or effect, ordering, directing, or requiring said respondent to change and move, or to change or move its railway tracks or line in Meaderville, Montana; that any alleged or purported or pretended order or direction or re-

quirement of said State Highway Commission to the said respondent in the premises, was a usurpation of power or authority, and the same was not duly given or made."

It appears from the evidence adduced at the public hearing held herein that Meaderville is a community of about one thousand people, composed largely of miners employed in the Butte mines, their families, and business men engaged in catering to the needs of the community, and that for more than forty years, the utility has served the community with street railway service. At one time, the utility's terminus was at a point approximately 800 feet beyond its present terminus. At just what time or under what circumstances the utility abandoned its tracks beyond the terminus that was in existence at the time of the issuance of the order of the State Highway Commission, hereinafter set forth, do not appear from the record. The complainants, however, contend that the old terminus of the utility should be re-established. In behalf of their complaint, they make a showing that the present terminus is located at such a point as to require a large portion of the residents of Meaderville to walk considerable distances to avail themselves of the street car service, and that by reason of the existence of some five or six soft-drink parlors on Main street, one of which is opposite the present terminus, the situation is obnoxious to the feminine population that have to pass in front of these dispensaries.

The utility makes the showing that the removal of its tracks was in no manner instigated by it but that on the other hand it opposed a curtailment of its tracks and complied with the order of the State Highway Commission only after receiving legal advice that it was legally bound to obey the order. It further expressed its willingness to abide by any lawful order that this Commission might make in the premises.

The State Highway Commission, on May 18, 1928, made an order for the removal of the utility's tracks as is evidenced by a certified copy of its minutes introduced in the records. The minute entry is as follows:

"The Commission discussed with the Silver Bow County Commissioners the necessity for having removed the track of the Butte Street Electric Railway Company, located in Main street,

Meaderville, near the north end of this paving contract. A field inspection had disclosed that public necessity, convenience and safety demand the removal of 380 feet of the track, from the north end to a point near the Leonard Mine yard entrance, because the street is too narrow to accommodate the 20-foot concrete pavement and 4-foot shoulders on each side, and also permit the track to remain. It was, therefore, the finding of the Commission that the track must be removed in the interest of the public welfare in using this state highway, and the Commission directed that a communication be addressed to the Butte Street Electric Railway Company, ordering the immediate removal of the 380 feet of the street railway track above described."

The record discloses that Main street, in Meaderville, for a distance of about one thousand feet, is embraced within Federal Aid Project No. 242-B, a state highway project undertaken by the State Highway Commission in conjunction with the Bureau of Public Roads, under the provisions of the Federal Highway Act (42 Stat. 212; 23 USCA 3). The project, a 28-foot highway, extends from Silver Bow county—Jefferson county boundary line to the eastern limits of the city of Butte. It was surveyed and located by the engineering department of the State Highway Commission and approved by the Bureau of Public Roads. That portion of the project, extending from the point where the state highway intersects Main street, Meaderville, to the city limits of Butte, consists of a 20-foot strip of concrete pavement with 4-foot shoulders on either side. The present location of the state highway will not permit the extension of the street railway track on Main street without impinging upon the state highway.

The complainants contend that the order of the State Highway Commission requiring the utility to remove its tracks was void by reason of lack of jurisdiction and because the order was not duly given or made, it being the contention that the order was made without notice to interested parties, such as complainants, and without public hearing where interested parties could present their objections.

It is further contended that the Public Service Commission of Montana, under its authority to require public utilities to ren-

der adequate service (§ 3899 R. C. M. 1921), has the right and power in this proceeding to require the utility to relay its tracks upon the said state highway despite the order of the State Highway Commission.

[1] As to the first contention, it is clear that it presents purely a judicial question that is beyond our jurisdiction to determine. The supreme court of Montana has held the Public Service Commission to be "a mere administrative agency created to carry into effect the legislative will" with "only limited powers, to be ascertained by reference to the statute creating it, and any reasonable doubt as to the grant of a particular power will be resolved against the existence of the power." State ex rel. Thatcher v. Boyle, 62 Mont. 97, 102, 204 Pac. 378. Nowhere in the Public Service Commission Act (Chap. 52, Laws of 1913, § 3879 et seq. R. C. M. 1921), are we invested with judicial powers or given the authority to pass upon the validity of acts of other departments of the state.

[2–4] The State Highway Commission is likewise an administrative agency of the state, created to carry into effect the legislative will, (§ 1783 et seq. R. C. M. 1921, Chap. 129, Laws of 1925). As pointed out in State v. State Highway Commission, 82 Mont. 63, 65, 265 Pac. 1, the State Highway Commission was created "for the purpose of securing a uniform system of highways throughout the state, and of obtaining the benefit of Federal aid under the acts of Congress." There is nothing in the act creating it that makes it subordinate to this Commission. It is a co-ordinate legislative agency and as such, equal in rank, importance, independence, and dignity to other legislative agencies. A duty exclusively entrusted to and enjoined upon it involves the performance of an official act by it that no other co-ordinate department has lawful authority or inherent power to characterize as invalid or to attempt to lay its coercive hand thereon. The State Highway Commission has the power and authority to acquire by purchase, eminent domain, or otherwise, rights-of-way for state highways and to lay out, alter, construct, improve, and maintain highways (§ 1797 R. C. M. 1921). It is lawful for the Board of County Commissioners to transfer and convey rights-of-way over and along county roads for state

highways, and it is their duty to make such transfer or conveyance upon receiving notice from the State Highway Commission that a state road has been established and definitely located over a county road and that said road will be improved and maintained by the state and that funds are available for the immediate construction of such road (§ 1795 R. C. M. 1921). Under express statutory authority, the State Highway Commission undertook the establishment of the instant project and by arrangement with the Board of County Commissioners of Silver Bow county, was granted the right to a right-of-way over the county road, which constitutes Main street in Meaderville. While the record is silent as to the precise nature of the action of the Board of County Commissioners, it is clear that the state highway was built in its present location with its consent and approval and that, under the mandatory provisions of § 1795, *supra,* the Board of County Commissioners was obliged to grant a right-of-way for the purpose of constructing the said state highway. Whether or not there existed franchise obligations in favor of the public preventing the Board of County Commissioners from granting a right-of-way on Main street can not be determined from the record herein as there is no evidence disclosing the terms of such franchise, if in fact such a franchise exists; nor is this a proper tribunal for the enforcement of franchise obligations in a situation where a co-ordinate state agency, acting within the scope of its statutory authority, does or performs some act alleged to impinge upon franchise obligations or rights. The acts of a public officer or Board are presumably valid and legal (Subdiv. 15, § 10606, R. C. M. 1921). This Commission is bound by that presumption in the present case, until such time as a competent tribunal has declared the acts of the State Highway Commission invalid. This is the view we adopted when the matter was first presented to us by the utility and further consideration has but strengthened us in our belief that we are bound to respect the order of the State Highway Commission until it is legally set aside by appropriate action. As to whether the State Highway Commission's order is open to the objections urged, we express no opinion. Under the views herein expressed, and the admitted fact that it is not practicable under existing circumstances to

extend the utility's tracks on Main street without impinging upon the state highway, and the further fact that by reason of the topography of the country it is not feasible to extend the utility's tracks down any other street or thoroughfare, the complaint herein must be dismissed.

An appropriate order will be entered. [Order omitted.]

NEW YORK SUPREME COURT.

NEW YORK CENTRAL ELECTRIC CORPORATION

v.

VILLAGE OF CASTILE et al.

(— Misc. —, — N. Y. Supp. —.)

Municipal plants — Electricity — Authority of the Commission.

The right of a municipal plant to make an extension of service beyond its own corporate limits must be with the consent and approval of the Commission if there is another company furnishing such service in that territory, and an attempted extension without such authority under such circumstances will be restrained.

[February 9, 1929.]

APPLICATION of an electric company for an injunction to restrain proposed extension by a municipal plant; granted.

Appearances: Clarence H. Greff, Attorney for plaintiff; Henry W. Killeen, of Counsel; Edmund B. Windsor, Attorney for defendants.

Pierce, J.: The plaintiff is the owner and operating an electric lighting system in the village of Perry and town of Castile. The village of Castile has an electric lighting plant in the village, lighting the streets and furnishing light and power to such of the inhabitants of the village as desire it, the system having been heretofore extended somewhat outside of the village limits. The plaintiff, or its predecessor, has received authority from the town board of the town of Castile to set its poles and string wires in and along the streets and highways of the town outside of the village of Castile, and has received the consent and approval of

the Public Service Commission of the state of New York for leave to operate its plant and to furnish light to the inhabitants of said town. The plaintiff is extending its lines throughout the town of Castile outside of the village of Castile. The defendant village of Castile, acting through its trustees and light commissioners, had started to extend its lines throughout the town outside of the village of Castile, and this action is brought by the plaintiff to restrain the defendant from such extension, and a temporary restraining order was obtained, together with an order to show cause, on the 19th day of November, 1928, why an injunction *pendente lite* should not be granted, restraining, during the pendency of this action and until the further order of the court, the defendants, and each and every of them, from extending the lines and power system operated by the village of Castile upon and along the highways within the town of Castile, until and unless the Public Service Commission shall grant its permission and approval so to do. The plaintiff is entitled to the protection of a court of equity in an application of this character. Brooklyn City R. Co. v. Whalen, 191 App. Div. 737, 182 N. Y. Supp. 283.

Both the plaintiff and the defendant have an electric light plant. The defendant's right to extend beyond the village of Castile exists by virtue of § 244 of the Village Law. The right to make such extension, however, must be with the consent and approval of the Public Service Commission, if there is another company furnishing light within the territory into which such system is proposed to be extended. There is no dispute but that the plaintiff is furnishing light to inhabitants in the town of Castile; that it is extending its lines so as to furnish light and power to inhabitants not heretofore accessible. There is no claim that the defendant has obtained the consent of the Public Service Commission to extend its lines. There is no claim that it has received the consent of the town authorities to erect poles and string wires in and along the streets and highways of the town.

Under these circumstances, I think that the plaintiff is entitled to a continuation of the injunction granted, to continue during the pendency of this action or until such time as the

consent of the Public Service Commission shall be granted to the defendant village of Castile, allowing it to extend its light and power lines beyond its present limits. An order to that effect may be entered.

OHIO PUBLIC UTILITIES COMMISSION.

RE LOGAN GAS COMPANY.

[Advanced Utility Rate Proceeding Nos. 189–192.]

Return — Duplication of allowance — Value of leaseholds — Natural gas.

1. Where a company has been allowed reasonable rental charges for the possession of natural gas leaseholds which are used and useful in the furnishing of its public utility service there is no warrant in law for a duplicate allowance of this charge in the guise of a return on the value, if any, of such leaseholds, p. 481.

Valuation — Market value — Natural gas leaseholds.

2. Isolated transactions involving the transfer of natural gas leaseholds do not indicate that there is any general market for such leaseholds, p. 482.

Valuation — Market value — Evidence — Natural gas leases.

3. The testimony of witnesses purporting to show the market value of natural gas leaseholds was held to be too speculative to warrant the inclusion of such estimates within a rate base where practically all the witnesses admitted that even were properties to change hands, the consideration would fluctuate according to the negotiations of the parties in interest, p. 482.

Valuation — Book cost — Natural gas leaseholds.

4. The consideration of actual expenditures of a company out of capital is the proper measure of value for items of property for which no market value can be used by the Commission and for which there is no figure on which a proper allowance for such property can be based, p. 482.

Valuation — General overheads — Theoretical overheads.

5. The Commisaion in theoretically reproducing a utility may apply a percentage allowance for general overheads which seems to be just, fair, and reasonable, p. 482.

[January 31, 1929.]

APPLICATION of a gas utility for increased rates; findings of value made.

P.U.R.1929B.

Finding and Order Upon Final Valuation.

By the **Commission**: This day, after full hearing and argument by counsel, this matter came on for consideration upon the protests of the respondent, the Logan Gas Company, and of the protestants, the City of Marion, Ohio, et al., to the tentative valuation of the several classes and kinds of property of the Logan Gas Company in the so-called nonordinance towns and surrounding territory, and of said property as a whole, as of December 31, 1924, as set forth in the finding and order of this Commission promulgated upon November 19, 1928, P.U.R. 1929A, 232.

The respondent, the Logan Gas Company has alleged numerous grounds of protest, and the protesting municipalities, few. These protests, in general and aside from the claim of the company for an additional arbitrary allowance for going concern value, a subject which has been fully adjudicated in this state, may be said to relate, generally, to the Commission's allowances in the tentative valuation for the company's gas leaseholds, and for general overheads. We shall discuss these two subjects in that order.

[1] Coming now to a consideration of the subject of leaseholds and the value ascribed thereto in the order of November 19, 1928, *supra,* prescribing a tentative value for this property of the Logan Gas Company, the Commission desires to preface its further finding in the premises by stating that in a rate-review the Commission may make allowances for the reasonable operating costs, or for a return upon the investment in used and useful property, the maintenance of which lies with the owners. In this case, the respondent company both claims *and will be allowed* the reasonable rental charges for the possession of the leaseholds which, designated by the company as Class No. 1, are used and useful in the furnishing of its public utility service, and there is no warrant in law for a duplicate allowance of this charge in the guise of a return on the value (if any) of such leaseholds, i. e., the company, already imposing upon the public the rental charges, as an operating expense, may not ask that

the public pay to it a second rental, as a return, for the use of the same property.

[2, 3] Again, the testimony which was adduced in the hearing on the protests to the tentative valuation, *supra,* indicates that some gas properties, including some leaseholds, have changed hands in the last few years. These isolated transactions do not convince the Commission that there is any general market for gas leaseholds. Even presuming, for the purposes of this case, that such a general market did exist, the Commission is forced to conclude, after a careful analysis of the transcript, that no market value has been shown which can, with reasonableness, be accepted for inclusion within a rate base. The personal opinions of the witnesses suggest only speculative amounts which are bottomed on nothing which is tangible or sound. It is admitted by practically all of the witnesses in this matter that even though these properties were to change hands, the consideration is one which must fluctuate according to the negotiations of the parties in interest.

[4] Since no market value can be used by the Commission, there is no figure to which we can turn for the proper allowance for the leasehold property which we believe and find to be used and useful for the convenience of the public in this proceeding, other than the book cost, or actual expenditures of the company out of capital properly allocated to the items of property of the respondent company which are within the jurisdiction of this Commission for the purpose of determining just and reasonable rates for its public utility service.

[5] And, now, the subject of the allowance for general overheads: Through a long period of years, the Commission, in dealing with the subject of general overheads, has found that the items which are generally accepted as comprising the same are fully covered by the use of 7 per cent. The amount to be allowed in this case, as in practically all others, is purely an estimate. The much higher percentage claimed by the respondent is also an estimate. Had the respondent come before the Commission with evidence of the actual cost of such items in the building of the plant herein involved, the decision of this body

no doubt, would have been materially changed by substantial evidence. Since, however, we are only theoretically reproducing this utility and are not guided in this case by historic data, we have seen fit to apply that percentage which, in our experience, we have found to be just, fair, and reasonable. The Commission, moreover, and as we set forth in the finding fixing the tentative valuation, is not unmindful of the unduly high direct overheads which have been included in the valuation of the respondent's property in this case.

The Commission, in reviewing its tentative valuation, has found, however, that some discrepancies and errors appear in the various allocations to the different cities, towns, and communities, all of which errors have been properly corrected in the summary sheet which will be adopted hereafter as the final valuation of the property of the Logan Gas Company involved in this proceeding.

The Commission, therefore, being fully advised in the premises, finds:

That, save and except as the same shall be involved in the correction of such summary, the protests filed herein by the protestants and the respondent are not well taken upon any ground thereof;

That, save and except as the same shall be changed by the correction of such summary, the inventory of such property of the Logan Gas Company is not incomplete or inaccurate, and

That, save and except as the same shall be involved in the correction of such summary, the valuation certified herein upon the 19th day of November, 1928, is not incorrect.

Mr. McCulloch did not participate in this opinion and finding.

OKLAHOMA CORPORATION COMMISSION.

RE REGULATIONS PRESCRIBING STANDARDS FOR GAS SERVICE.

[Cause No. 8886, Order No. 4570.]

Payments — Deposit to secure future payment — Gas.

1. The only object in permitting a utility to require a deposit is that the payment of the current bills of consumers will be guaranteed and secured by the posting of the amount required, and, therefore, the amount should not exceed the average bill for any given classification of consumers, p. 485.

Payment — Deposit — Interest on deposit.

2. The amount of interest which the utility should be required to pay on deposits for the securing of bills should be the legal rate of interest in the state (6 per cent), rather than the current banking rate, in view of the fluctuation of the latter, p. 486.

Service — Statute — Reconstruction — Gas.

3. A Commission regulation regarding the free extension of gas service to domestic consumers was amended so that whenever an extension of a distribution system would be necessary for service, the utility would be required to furnish and install at least 100 feet of main per applicant exclusive of streets, alleys, and rights-of-way of all kinds without cost to the applicant, p. 487.

[January 11, 1929.]

AMENDMENTS to certain regulations prescribing standards for gas service; amendments approved.

By the **Commission**: On the 1st day of August, 1928, the Corporation Commission of the state of Oklahoma issued its notice addressed to all corporations, associations, companies, individuals, their trustees, lessees or receivers, successors or assigns, owning, operating or managing any plant or equipment, or any part thereof, directly or indirectly for public use, or which may supply any commodity to be furnished to the public; (a) for the conveyance of gas by pipe line; (b) for the production, transmission, delivery, or furnishing of heat or light with gas, that on the 5th day of September, 1928, the Commission would conduct a general hearing at its court room in the Capitol at Oklahoma City, for the purpose of considering the adoption of amendments to Order No. 2089 made and promulgated by

the Commission on August 10, 1922, as amended by Order No. 2273 as of September 23, 1923, and that it would particularly consider the adoption of amendments to Rule 36 of said Order No. 2089 affecting the cash deposits for the guarantee of the payment of current bills and the rate of interest which shall be paid by public utilities thereon, as well as the amendment to Rule 40 of said Order No. 2089 as reflected by Order No. 2273 affecting the extension of gas mains, together with such other amendments as might be offered or suggested by any interested party at the time of the hearing. Notice was published as is required by law, in a newspaper of general circulation in the state of Oklahoma on August 10, August 17, August 24, and August 31, 1928, and proof of said publication has been made to the Commission and is on file among the records of this cause.

Pursuant to said notice, on the 5th day of September, 1928, the Commission conducted a hearing which was attended by numerous representatives of gas utilities operating within the state of Oklahoma, which representatives presented testimony with respect to their contention as to the amount of deposit which should reasonably be required of gas consumers within the state of Oklahoma, as well as in connection with the rate of interest which should be paid consumers upon said deposits. Evidence was also introduced with respect to the extension of mains and the amount of free extension which should be required of gas utilities in case of such extension in order to supply consumers desiring such service. The case was not concluded on the 5th day of September, but was continued until the 2nd day of October, 1928, at which time additional testimony was introduced and the case closed.

[1] A great portion of the testimony offered was with respect to the amount of deposit which should be required by consumers to guarantee the payment of bills, and the rate of interest which should be payable upon said deposits by the utilities. It was contended by some of the gas utilities that the present requirement of Rule 36, of a deposit covering the average bill of a consumer, for one-sixth of one year, constitutes a reasonable requirement and does not result in a deposit in excess of that

which is necessary to protect the average bill of the average consumer. Exhibits were introduced by these utilities upon this question. These exhibits, however, disclose the fact to be that in certain months of the year the deposits are largely in excess of the amount necessary to protect the companies in the collection of their bills. For instance: One of the exhibits covering the period of from May, 1927, to August, 1928, shows that the total revenue during that period, enjoyed by the company, was $157,654.52, or an average for this period per month of $13,137.88 while the total deposits for the months embraced aggregate $222,329.48, or an average per month of $18,527.45 as against the average bills per month of $13,137.88. This exhibit also shows that with the exception of a few months during the period the amount of deposits on hand was very largely in excess of the monthly bills; the monthly bills running as low in some months as $5,375.21 with a deposit for that month of $17,658.29. The only object in permitting the utility to require such a deposit is that the payment of the current bills of the consumers will be guaranteed and secured by the posting of the amount required. The order now in effect does not require the utilities to exact a deposit, but merely permits them to do so for their protection in connection with the collection of bills, and it is, therefore, apparent that the amount should not exceed the average bill for any given classification of consumers.

[2] With respect to the amount of interest which should be allowable, the utilities contend that they should not be required to pay in excess of the amount which is paid by banking institutions upon time deposits, and objection was offered to the increase of the rate of interest from 5 per cent per annum to 8 per cent per annum for these reasons. Upon the other hand, testimony shows that many of the utilities, if not all, use the customers' deposits in connection with the transaction of their current business as working capital, and upon which, in rate adjustments, the rate has heretofore made an allowance of approximately 8 per cent per annum. Owing to the fact, however, as these deposits fluctuate from time to time, and the whole amount of deposits may not be in use as working capital, there is some

force to the argument that the same rate should not be paid as interest as is allowed in the adjustment of rates. It is also indicated in the testimony, that the legal rate of interest in the state of Oklahoma, in the absence of contract, is 6 per cent per annum.

[3] Objection was offered by all of the utilities represented, to that portion of the proposed amendment affecting the extension of gas mains, to new consumers, and which contemplated requiring the amount of free extension to prospective consumers based upon the size of the pipe installed. It was contended by the utilities that this amendment would lead to confusion and dissatisfaction on account of the fact that each consumer would probably feel that he was entitled to the same amount of free extension to serve him that his neighbor might have installed, irrespective of the size of pipe.

There was other testimony affecting the amendment to the rules, but which the Commission does not consider necessary to recite in detail.

From all the testimony taken at the two hearings, however, the Commission believes that the rule with respect to the amount of deposit to be posted by the consumer as a guarantee for payment of current bills, should be modified and adjusted substantially as indicated in the notice, and that the rate of interest which is required to be paid should be fixed at the legal rate of interest in effect within the state of Oklahoma, in the absence of contract; that with respect to free extensions, the rule should be amended so as to require free extension to all alike, regardless of the size of pipe, but that the distance to which such extension should be made, should be increased from 75 feet as at present, to the distance of 100 feet.

Now on this the 11th day of December, 1928, the Commission having under consideration the matters and things involved at said hearings, is of the opinion and finds:

First: That subdivision (A) of Rule 36 of Order No. 2089 should be amended so as to permit the utilities engaged in the rendition of gas service within the state of Oklahoma, to require a cash deposit of one-eighth of the estimated annual bill of such consumer, provided that in no case shall the deposit required

for domestic consumers be in excess of $2 per room, excluding bath rooms, sun or sleeping porches, hallways, breakfast rooms, and rooms of like type, of such consumer, and that the utility may require a minimum deposit of $5 per consumer.

Second: That the utility shall be required to pay such consumer interest upon such deposit at the rate of 6 per cent per annum, payable annually.

Third: That subdivision (a) of Rule 40 of said Order No. 2089 as amended by Order No. 2273, should be amended so as to entitle the consumer or prospective consumer to a free extension of main, subject to the other terms and provisions of said order, of not less than 100 feet for each applicant, exclusive of streets, alleys, and rights-of-way of all kinds in addition to the other exceptions contained therein.

It is therefore the *order* of the Commission, premises considered, that subdivision (A) of Rule 36 of Order No. 2089 be and the same is hereby amended to read as follows, to-wit:

(A) Each utility may require from any consumer or prospective consumer, a cash deposit intended to guarantee payment of current bills. Such required deposit shall not exceed in amount one-eighth of the estimated annual bill of such consumer; provided, however, that in no event shall domestic consumers be required to make a deposit in excess of $2 per room, excluding bath rooms, sun or sleeping porches, hallways, breakfast rooms, and rooms of like type, for residence; provided further, that a minimum deposit of $5 may be required in residences of more than three rooms. Interest shall be paid by the utility upon such deposit at the rate of 6 per cent per annum, payable annually, and upon return of the deposit for the time such deposit was held and the consumer was served by the utility since the last annual interest payment, provided such period is not less than six months.

It is the *further order* of the Commission that subdivision (A) of Rule 40 as amended by Order No. 2273 be and the same is hereby amended to read as follows, to-wit:

(A) Whenever an extension of the utility's distribution system is necessary in order that an applicant or group of ap-

plicants whose premises are located within the municipality in which the utility is authorized to operate, may receive service, the utility shall furnish and install at least 100 feet of main per applicant, exclusive of streets, alleys, and rights-of-way of all kinds, without cost to the applicant or applicants.

It is the *further order* of the Commission, that neither of the amendments hereby adopted shall preclude the making of other requirements with respect to deposits to secure payment of current bills, or the free extension required at the hands of public utilities in special cases which may be submitted to the Commission, and where special circumstances or conditions justify the making of an extension thereto upon proper order of the Commission.

This order to be in full force and effect from and after its promulgation and publication as required by law.

OKLAHOMA CORPORATION COMMISSION.

UNIVERSITY SCHOOL EXCHANGE

v.

SOUTHWESTERN BELL TELEPHONE COMPANY.

[Cause No. 9047, Order No. 4576.]

Payment — Extension of credit — Company rules.

1. A telephone company has a right to make and enforce reasonable rules and regulations concerning the extension of credit to its patrons and to determine to whom it should extend credit within reasonable limitations, and where the extension of credit has been abused, to require reasonable security for the payment of its bills before extending credit, p. 491.

Commissions — Jurisdiction of managerial questions.

2. The question of extending credit by a telephone company to its subscribers is a matter of business management to be handled by the company's officers in a reasonable way in the absence of any arbitrary demands or unreasonable discrimination against its patrons, p. 491.

Payment — Requiring deposit — Poor credit of corporate officers.

3. The action of a telephone company in requiring a deposit to secure payment from a small corporation which had always previously

paid its bills, was held to be warranted where the president and general manager of such corporation had a poor credit rating and had his residence phone discontinued, p. 491.

[January 24, 1929.]

COMPLAINT by a telephone subscriber against certain rules and regulations of the company; complaint dismissed.

By the **Commission**: On December 4, 1928, the plaintiff filed a complaint before this Commission charging the defendant, telephone company, with denying plaintiff credit for long distance telephone service unless plaintiff would make a deposit of the sum of $25 with the defendant to secure the payment of long distance bills. Plaintiff alleged that this was an unreasonable discrimination against it and prayed that the defendant company be required to extend credit to the plaintiff by granting it long distance service without the deposit mentioned.

The case was set for hearing for December 10, 1928, at which time plaintiff appeared by its president and general manager, Mr. W. O. Pratt, and by its attorney, Haskell Paul, and defendant appeared by its officers and attorneys and all parties announced ready for trial; whereupon, Mr. Pratt, for the plaintiff, testified that the plaintiff corporation was incorporated with a capital stock of $1,000, of which stock he owned $800, and that $50 of such stock was owned by his wife, $50 of said stock was owned by his daughter and that a lady by the name of Clara Smith had agreed to purchase $50 of such stock and had paid $40 thereon. Mr. Pratt stated that he was general manager and by virtue of his stock ownership, was in control of the corporation. He testified that the corporation had a small place of business located at 747 Asp avenue in Norman and contended that although the corporation had paid its telephone bills, that the defendant company had refused it further long distance credit because its president and manager, Mr. Pratt, had failed to pay his telephone bills assessed against his residence telephone. Witness admitted that his residence telephone bill was delinquent and service had been discontinued because of his failure to pay the bill due defendant company for something over $8, about $7 of which was for long distance service.

[1–3] The manager of the Norman exchange of the defendant testified that it was customary to refuse to extend credit to telephone patrons where the credit was unsatisfactory to the defendant company; that there were some instances where credit had been refused and where the patron had subsequently posted a deposit to guarantee the payment of bills and by that method had arranged for credit, but the manager testified that none of the company's patrons at Norman had been given credit for long distance service where they owed the company for long distance service and had refused to pay it. The Norman manager for the defendant testified that upon learning that the book exchange conducted by Mr. Pratt was a corporation, she made inquiry of the local Credit Men's Association at Norman with reference to its standing and found that such corporation was unknown and had no rating but that she was also advised that the credit rating of Mr. Pratt, the manager for the plaintiff, was bad.

A number of tickets covering toll service charged against Mr. Pratt were introduced in evidence and were admitted by the plaintiff to have been long distance calls concerning the business of the corporation. They had not been paid and no substantial reason was given for their nonpayment and it appeared that after repeated efforts to get Mr. Pratt to pay this bill, that service was discontinued over his residence telephone and the telephone was finally taken out.

The telephone company took the position in the defense of this action that they were practicing no discrimination against Mr. Pratt but were merely exercising their judgment and discretion in extending or denying credit; that such was a part of the power and duties incident to the management of a telephone company's business and that a telephone company, like any other business, should have a right to determine whether it should extend credit or not in any particular case.

After giving the matters and things involved in this cause due consideration, the Commission is of the opinion and finds:

That no discrimination has been practiced by the defendant against plaintiff and that defendant has a right to make and

enforce reasonable rules and regulations concerning the extension of credit to its patrons and has the right to determine to whom it should extend credit within reasonable limitations, and where the extension of credit has been abused, to require reasonable security for the payment of its bills before extending credit.

The Commission further finds that this matter is one of business management to be handled by the company's officers in a reasonable way in the absence of any arbitrary demands or unreasonable discrimination against its patrons.

The Commission finds that in this case there appears to have been no unreasonable discrimination practiced against the complainant and, therefore, the complaint should be dismissed.

VERMONT PUBLIC SERVICE COMMISSION.

RE PUBLIC UTILITIES CONSOLIDATED CORPORATION et al.

[No. 1401.]

Accounting — Sales to foreign corporation — Capital accounts.

1. The Commission refused to issue a certificate authorizing a foreign utility, which had purchased a domestic utility, to do business within the state until it agreed to keep its accounts in conformity with a statute requiring that each item of property should be carried in the fixed capital accounts at no more and no less than its actual cost, p. 493.

Consolidation, merger, and sale — Transfer to foreign corporation — Commission jurisdiction.

2. Unless it can be fairly shown that marked benefits will result to the public from a transfer of all assets of a domestic utility to a foreign one, the public good will best be promoted by keeping local corporations domestic, in view of the limited jurisdiction of the Commission over the securities of foreign companies, p. 495.

[January 30, 1929.]

APPLICATION of a foreign corporation for certificates for authority to do business within the state; denied. Petition of a local corporation to sell and a foreign corporation to buy public

utility properties; denied. Petition of a foreign corporation to mortgage its property in Vermont as security for bonds; denied.

Appearance: Lawrence, Stafford & Bloomer for petitioners.

By the **Commission:** [1] These petitions filed March 6, 1928 were not heard until May 4, 1928 because the report filed March 3, 1928 by the Public Utilities Vermont Corporation of its compliance with our Order No. 1321, dated July 1, 1927, showed that this company had entirely disregarded that order requiring this company to open and keep its books in strict conformity with the Uniform System of Accounts prescribed by the Commission and to make an entry on such books of $550,000 as the value of the property formerly owned by the Clyde River Company as found by this Commission. Our Order No. 1321 was issued on the petition of this corporation for our approval of an issue of 10,000 shares of no par value stock in consideration of the transfer of all the assets of the Clyde River Power Company from John J. Flynn to the petitioner. In that case it appeared that while the book cost to the Clyde River Power Company was $736,295.51, this property was purchased by John J. Flynn at a receiver's sale for $507,500. On all the evidence the Commission found that for the purposes of that case only the value of the property was $550,000 and ordered that value to be entered on the books of the Public Utilities Vermont Corporation.

The report filed by this company March 3, 1928, showed that on December 1, 1927 it was carrying on its books this property as follows:

"Fixed capital	$566,608.51
Fixed capital due to appraisal	197,272.02"

This $197,272.02 on the asset side of the balance sheet was accounted for on the liability side by the following entries:

"Capital stock equity due to appraisal	$129,087.32
Reserves, Retirement due to appraisal	68,184.70"

It is obvious that this Commission will be powerless to prevent over capitalization as required by General Laws, § 5061, VII,

and § 10 of No. 81 of the Laws of 1925 if such practices are allowed. Therefore, this Commission refused to issue its certificate authorizing Public Utilities Consolidated Corporation of Arizona to transact business in this state and also refused to set a date for hearing of the other two petitions until the Public Utilities Vermont Corporation shall have fully complied with the order in No. 1321, dated July 1, 1927.

At a conference with the Commission and the Public Utilities Vermont Corporation held on March 27, 1928, R. J. Andrus, vice president and G. E. Shrader, the accountant, contended that the above report was a complete and proper compliance with the order, but neither of these officials, when requested by the Commission to do so, could point out any justification for such entry in the Uniform Classification of Accounts for Electrical Utilities prepared by the Committee on Statistics and Accounts of Public Utilities and recommended for adoption by State Commissions at the annual meeting of the National Association of Railway and Utilities Commissioners held in Detroit, Michigan, November, 1922. It is apparent that this entry was not only a noncompliance with the order but flagrant disregard of paragraph three on page thirty of this Uniform Classification of Accounts which is as follows: "Fixed Capital to be Entered and Retained on Books at Cost. All charges to fixed capital accounts shall be at the actual cost of the property acquired, at the time of its acquisition. A bona fide contract or agreement of purchase and sale between entirely separate parties shall be prima facie evidence of actual cost. Each item of property shall be carried in the fixed capital accounts at no more and no less than its actual cost unless, or until, such property is abandoned, replaced, reconstructed, or converted, when the accounting shall be as hereinafter set forth."

At this juncture Mr. Andrus stated that the company would file with the Commission a new balance sheet omitting this $197,272.02 item. The company on March 31, 1928, submitted a corrected report not satisfactory to the Commission and on May 4, 1928 a second corrected report which apparently fol-

lowed the order of the Commission. At the hearing on this date the application and petitions set forth in the caption thereof were heard.

The first question presented is whether or not the public good of this state would be promoted by our consenting, under General Laws 4982, to the sale of all the assets of the Public Utilities Vermont Corporation to the Public Utilities Consolidated Corporation of Arizona.

[2] We have recently held that "unless it can be clearly shown that marked benefits will result from a transfer of all the assets of an operating Vermont utility corporation to a foreign corporation the public good will best be promoted by keeping such corporations domestic." Petitions of Chester Water and Light Company et al. to sell to Allied Vermont Utilities, Inc. of Delaware, December 22, 1928, P.U.R.1929B, 316. This is because the state's jurisdiction over the capitalization of a domestic corporation is complete while there is some doubt as to the jurisdiction of this state over the stock and bonds of a foreign corporation.

Officials of the Vermont and Arizona Corporations, the latter being owned and controlled by W. B. Foshay Company of Minneapolis, urged that since the Vermont Company was in need of more capital for extensions and the purchase of new properties, this sale of assets would promote the public good of Vermont because better terms could be obtained from the sale of first mortgage bonds of the Arizona Company if it owned the Vermont assets than could be obtained by the sale of either second mortgage bonds of the Vermont Company or first lien mortgage bonds of the Arizona which would have to be the method of financing in case the transfer of assets was not allowed. It appeared that all the stock of the Vermont Corporation was owned by the Arizona Corporation which also owned either assets or stock control of other operating utility companies in Arizona, California, Colorado, Idaho, Nevada, Montana, Kansas, Illinois, and Georgia. At present there are some $300,000 first mortgage bonds outstanding against the Vermont Company.

We are not at all impressed with this contention. When W.

B. Foshay Company entered the electric utility field in Vermont during the summer of 1926 by the purchase of stock control of the Vergennes Electric Company, considerable emphasis and publicity was given to the policy of the purchasing company in conducting its operations through the medium of domestic corporations. Therefore, on petition of the Foshay Company this Commission held that the public good would be protected by permitting amendments to the Articles of Association of the Vergennes Electric Company whereby its name was changed to the Peoples Hydro Electric Vermont Corporation and its field of operations broadened and its capitalization materially increased. After acquiring control of the Montpelier & Barre Light & Power Company, a Massachusetts Corporation, early in 1927, the Foshay interests petitioned and were allowed by this Commission to transfer these assets to the Peoples Hydro Electric Vermont Corporation. In June, 1927, when the Foshay Company purchased from John J. Flynn the assets of the Clyde River Power Company, we held that the establishment of the Public Utilities Vermont Corporation to take over the assets of the Clyde River would promote the general good. From the above it will be seen we have thrice agreed with the Foshay Company's contention that operating utility companies in this state should be domestic corporations and we find no reason, on the record of this case, for departing from this principle. On the contrary, the loose and irregular accounting methods of the Public Utility Vermont Corporation, revealed in this case, argue strongly against the state relinquishing any degree of control over this corporation.

Application and petitions are, therefore, denied.